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No.

IN THE
SUPREME COURT OF THE UNITED STATES

APRIL TERM 1981

WAYNE SHERRARD and JANET SHERRARD, his wife,

Petitioners,

v.

DONALD S. OWENS, Judge of Probate, Ingham County Probate Court,

et al.,

Defendants.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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QUESTIONS PRESENTED

1. Whether the decision of the court of appeals is in conflict with this Court's decision in Smith v. Organization of Foster Families, 431 U.S. 816 (1977), in that it fails to recognize any constitutionally protected liberty interest on the part of the Petitioners.

2. Whether the reliance of the court of appeals on the finding of the district court that the Petitioners were afforded an adequate due process procedure with regard to the licensing provisions of Michigan law was error, in that the state administrative law judge found that the Petitioners were not accorded due process.

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UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MICHIGAN

January 14, 1980, Motion for Summary Judgment in Favor of the Defendants Granted

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

March 18, 1981, Judgment of the District Court Affirmed

OPINIONS BELOW

The opinion below by the Circuit Court of Appeals for the Sixth Circuit is a per curiam decision which has not yet been published. The opinion below by the District Court for the Western District of Michigan is published at 484 F. Supp. 728. The opinions of the Sixth Circuit and of the Administrative Law Judge are set out in Appendix A.

JURISDICTION

The Petitioners, Wayne and Janet Sherrard, are seeking review of the judgment below entered in favor of the Respondents: Donald S. Owens, Judge of Probate Court, Ingham County, Lansing, Michigan; Michigan Department of Social Services; Family and Child Services of the Capitol Area, Inc.; Lucille Barber, individually and as employee, acting director and board member of Family and Child Services of the Capitol Area, Inc.; Mary Ellen

Heater, individually and as employee of Family and Child Services of the Capitol Area, Inc.; Barbara McLean, individually and as employee of Family and Child Services of the Capitol Area, Inc.; Timothy G. Holland, Attorney at Law, individually and as guardian for Candace and Vernita Smith, Minors; jointly and severally. The judgment of the Court of Appeals for the Sixth Circuit was entered on March 18, 1981. This petition for certiorari was filed within ninety days of that date. 28 U.S.C. § 2101(c). This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS AND RULES INVOLVED

U.S. Const. amend. XIV, § 1

> Section 1. Due process of law
> * * * nor shall any State deprive any person of life, liberty, or property, without due process of law; * * *

28 U.S.C. § 1331

§ 1331. Federal question; amount in controversy; costs

(a) The district courts shall have original jurisdiction of all civil actions wherein the matter in controversy exceeds the sum or value of $10,000, exclusive of interest and costs, and arises under the Constitution, laws, or treaties of the United States, except that no such sum or value shall be required in any such action brought against the United States, any agency thereof, or any officer or employee thereof in his official capacity.

28 U.S.C. § 1343

§ 1343. Civil rights and elective franchise

(a) The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person:

(1) To recover damages for injury to his person or property, or because of the deprivation of any right or privilege of

a citizen of the United States, by any act done in furtherance of any conspiracy mentioned in section 1985 of Title 42;

(2) To recover damages from any person who fails to prevent or to aid in preventing any wrongs mentioned in section 1985 of Title 42 which he had knowledge were about to occur and power to prevent;

(3) To redress the deprivation, under color of any State law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States;

(4) To recover damages or to secure equitable or other relief under any Act of Congress providing for the protection of civil rights, including the right to vote.

42 U.S.C. § 1983

§ 1983. Civil action for deprivation of rights

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

42 U.S.C. § 1985(3)

§ 1985.

. . . .

Depriving persons of rights or privileges

(3) If two or more persons in any State or Territory conspire . . . , for the purpose of depriving, either directly or indirectly, any person or class

of persons of the equal protection of the laws, or of equal privileges and immunities under the laws . . . .

42 U.S.C. § 1988

§ 1988. Proceedings in vindication of civil rights

The jurisdiction in civil and criminal matters conferred on the district courts by the provisions of this chapter and Title 18, for the protection of all persons in the United States in their civil rights, and for their vindication, shall be exercised and enforced in conformity with the laws of the United States, so far as such laws are suitable to carry the same into effect; but in all cases where they are not adapted to the object, or are deficient in the provisions necessary to furnish suitable remedies and punish offenses against law, the common law, as modified and changed by the constitution and statutes of the State wherein the court

> having jurisdiction of such civil or criminal cause is held, so far as the same is not inconsistent with the Constitution and laws of the United States, shall be extended to and govern the said courts in the trial and disposition of the cause, and, if it is of a criminal nature, in the infliction of punishment on the party found guilty.

STATEMENT OF THE CASE

On May 15, 1978, the Petitioners, Wayne and Janet Sherrard, took custody of Candace and Vernita Smith as foster parents, pursuant to an order of the Director of Children's Services. The Sherrards at that time were granted a six-month provisional foster-home license, which was renewed for another six-month period in November of 1978.

The foster children lived with the Sherrards for one year, at which time

a case worker from Family and Child Services of Michigan, Respondent Mary Ellen Heater, obtained an ex parte order from Respondent Donald S. Owens, Judge of Probate, removing the foster children from the Sherrard home on the grounds that the Family and Child Services Agency was not recommending renewal of the Sherrard's foster home license.

The children were removed from the Sherrard's home on May 14, 1979, and placed in another foster home. The Sherrards then appealed the decision not to renew the foster home license through a hearing before an Administrative Law Judge pursuant to Mich. Comp. Laws Ann. § 722.121(2); Mich. Stat. Ann. § 25.358(21)(b). In this hearing, the Sherrards claimed that the Family and Child Services Agency had not complied with § 92 of the Michigan Administrative Procedures Act in denying the renewal

of the foster home license. By opinion dated March 26, 1980, the Administrative Law Judge found that the agency had failed to comply with the notice and hearing provisions of § 92. By order dated April 4, 1980, John T. Dempsey, Director of the Department of Social Services, accepted the findings of the Administrative Law Judge and ordered the matter to be referred to the Family Home Licensing Division for further proceedings. On July 21, 1980, the Director of the Bureau of Regulatory Services issued a letter whereby the Sherrard's foster home license was renewed, effective May 15, 1979, as a regular day care license.

The Sherrards filed the complaint in the instant action in the United States District Court for the Western District

of Michigan on August 15, 1979. The Respondents filed a Motion to Dismiss which was converted to a Motion for Summary Judgment and was granted by order and opinion dated January 14, 1980. The Circuit Court of Appeals for the Sixth Circuit affirmed the judgment of the district court in a per curiam opinion dated March 18, 1981.

REASONS FOR GRANTING THE WRIT

I. THE COURT OF APPEALS' DECISION IS IN CONFLICT WITH THIS COURT'S DECISION IN SMITH V. ORGANIZATION OF FOSTER FAMILIES, 431 U.S. 816 (1977), IN THAT IT FAILS TO RECOGNIZE ANY CONSTITUTIONALLY PROTECTED LIBERTY INTEREST ON THE PART OF THE PETITIONERS.

In Smith v. Organization of Foster Families, 431 U.S. 816 (1977), this Court addressed the issue of whether a foster family may assert a liberty interest in the continued care of their foster children which requires the guarantees of due process prior to removal of the

children from the home. The Court decided the case without specifically holding that a liberty interest exists, choosing rather to reverse the district court on the issue of the adequacy of New York's pre-removal procedures. In so doing, however, the Court's extended discussion indicates that its decision was based in large part on the complex and thorough pre-removal procedures which existed in New York, and on the fact that the biological parents asserted a right to regain custody of their children, and this right was seen to take precedence over the rights of the foster parents to a continued foster family relationship.

The Petitioners respectfully submit that the court of appeals failed to consider the importance of these factors to the holding of Smith, and that therefore that court's finding that a constitutionally protected liberty interest does not exist in the instant case, where the crucial

factors of Smith are not present, is error.

The Petitioners acknowledge the fact that this Court did not explicitly hold in Smith that a liberty interest exists in long-term foster parents such that they are entitled to full due process protections. Nevertheless, the Smith opinion allows the inference to be drawn that a certain set of facts could exist which would give rise to a constitutionally protected interest. In this regard, the Petitioners cite Judge Tuttle of the Fifth Circuit who, in his dissenting opinion in Drummond v. Fulton County Department of Family and Child Services, 563 F.2d 1200 (5th Cir. 1977), cert. denied, 437 U.S. 910 (1978), presented the following analysis:

> A careful reading of the opinion indicates to me that but for the existence of the narrower ground in that case and but

for the fact that the contest before the court was being waged between foster parents on the one hand and natural parents on the other, the court would readily have determined that such constitutionally protected liberty interest did exist. In the first place, the court recognized that, although "the usual understanding of 'family' implies biological relationships, and most decisions treating the relation between parent and child have stressed this element" and that "a biological relationship is not present in the case of the usual foster family" nevertheless "biological relationships are not exclusive determination of the existence of a family." Ibid. 431 U.S. 843, 97 S.Ct. 2109-10. Most telling is the following language from the Court's opinion:

> "Thus the importance of the familial relationship, to the individuals involved and to the society, stems from the emotional attachments

that derive from the intimacy of daily association, and from the role it plays in 'promot[ing] a way of life' through the instruction of children, Wisconsin v. Yoder, 406 U.S. 205, 231-233, 92 S.Ct. 1526, 1541-42, 32 L.Ed.2d 15 (1972), as well as from the fact of blood relationship. No one could seriously dispute that a deeply loving and interdependent relationship between an adult and a child in his or her care may exist even in the absence of blood relationship. (Footnote omitted). At least where a child had been placed in foster care as an infant[,] has never known his natural parents and has remained continuously for several years in the care of the same foster parents, it is natural that the foster family should hold the same place in the emotional life of the foster child, and fulfill

> the same socializing functions, as a natural family. (Footnote omitted). For this reason, we cannot dismiss the foster family as a mere collection of unrelated individuals. Cf. Village of Belle Terre v. Barass, 416 U.S. 1, 94 S.Ct. 1536, 39 L.Ed.2d 797 (1974)." [Emphasis added.] Ibid. 431 U.S. 844, 97 S.Ct. 2111.

Following this language, the Court pointed up the distinctions between the foster family and the natural family, particularly in light of the fact that the foster family is a creation of statute and the Court concluded this discussion by saying:

> "In this case, the limited recognition accorded to the foster family by the New York statutes and the contracts executed by the foster parents argue against any but the most limited constitutional 'liberty'." [Emphasis added.]

The Court then discussed the posture of the OFFER case

as being a contest between foster parents and the natural parent of a child. The Court then said:

> "It is one thing to say that individuals may acquire a liberty interest against arbitrary governmental interference in the family-like associations into which they are freely entered, even in the absence of biological connection or state law recognition of the relationship. It is quite another to say that one may acquire such an interest in the face of another's constitutionally recognized liberty interest that derives from blood relationship, state law sanction, and basic human right—an interest the foster parent has recognized by contract from the outset. Whatever liberty interest might otherwise exist in the foster family as an institution that interest must be substantially attenuated where the proposed

> removal from the foster family is to return the child to his natural parents." [Emphasis added.]
> Ibid. 431 U.S. 846, 97 S.Ct. 2111.

563 F.2d at 1213-14 (Tuttle, J. dissenting; joined by Goldberg, J.).

The Petitioners point out that, unlike in Smith, in the instant case Michigan statutes provide no procedures for removal of children from foster homes. Thus, even the minimal liberty interest recognized by the Court in Smith is unprotected by the Michigan statutory scheme. In addition, the natural parents of the children in the instant case are not parties to the lawsuit, the state probate court having terminated all rights of the natural parents by order of June 12, 1979. The second consideration of the Court in Smith, then, is not present in the instant case. The Petitioners therefore urge that the court of appeals

erred in failing to acknowledge the clear factual differences between the instant case and Smith, thereby failing to give effect to the clear import of Smith that long-term foster parents in the situation of the Petitioners are entitled to due process protection.

II. THE COURT OF APPEALS' RELIANCE ON THE FINDING OF THE DISTRICT COURT THAT THE PETITIONERS WERE AFFORDED AN ADEQUATE DUE PROCESS PROCEDURE AS REGARDS THE LICENSING PROVISIONS OF MICHIGAN LAW WAS ERROR, IN THAT THE STATE ADMINISTRATIVE LAW JUDGE FOUND THAT THE PETITIONERS WERE NOT ACCORDED DUE PROCESS.

The district court in its opinion examined the licensing provisions of Michigan law concerning foster homes, found them to be constitutionally adequate, and found that the Defendants had substantially complied with those provisions. Sherrard v. Owens, 484 F. Supp. 728, 741-43 (W.D. Mich. 1980). Subsequent to the district court's decision, in an

opinion dated March 26, 1980, Administrative Law Judge John N. Atkinson found that the Petitioners were not afforded the due process procedures required by Michigan law and recommended that the case be returned to the licensing authorities for further action. The licensing authority, by letter dated July 21, 1980, reversed the prior decision to terminate the Petitioners' license and renewed the license, effective May 15, 1979. Thus, to the extent that the district court's decision rested on a finding that the Petitioners' loss of license justified the removal of the children from the home, the decision must be viewed as erroneous, since the Petitioners did not in effect ever lose their license. The Petitioners asserted this argument below, and now claim that it was error for the court of appeals to fail to give effect to the state administrative procedures which clearly

contradict the finding of the district court judge that due process had been afforded the Petitioners. The district court in its opinion stated:

> As a practical matter in the facts of this case it makes little difference that Michigan laws apply to licensing rather than to removal since the two foster girls were removed from the foster home on the day the Sherrards' license expired. What New York law provides that Michigan laws do not is notice and a hearing before removal. Michigan law provides notice before a change in the license. The fact that the children were physically removed before an administrative hearing was held is immaterial to the rights of the Sherrards. What is important is the statutory right of the foster parents to a hearing, to have their lawyer present, to present evidence and to appeal an adverse decision to the state circuit court. The children remained at all times in the

> county and had there been a reversal of the decision to revoke the license, the children were physically available for return to the Sherrards' home.

484 F. Supp. at 743. Thus, the court assumed that the compliance of the Defendant state authorities with the Michigan licensing procedures adequately protected the petitioners' interest, and rested its dismissal of the action on that ground.

It is the Petitioners' position that the subsequent state administrative decision which effectively negated the district court's finding was entitled to consideration by the court of appeals. The court, however, merely affirmed the district court's decision without discussing the effect of the state procedures on the district court's findings. This summary affirmance is urged by the Petitioners to be error which requires reversal of the court of appeals' decision.

CONCLUSION

Based on the foregoing, the Petitioners pray that a writ of certiorari be granted.

Respectfully submitted,

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Owosso, Michigan 48867

No. 80-1102
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

WAYNE SHERRARD and JANET SHERRARD,

Plaintiffs-Appellants,

v.

DONALD S. OWENS, JUDGE OF PROBATE COURT, INGHAM COUNTY; MICHIGAN DEPARTMENT OF SOCIAL SERVICES, FAMILY & CHILDREN SERVICES OF THE CAPITAL AREA: LUCILLE BARBER, Individually and as an employee; BARBARA McLEAN, employee; TIMOTHY G. HOLLAND, Attorney, Individually and as Guardian for Candace and Vernita Smith, Minors,

Defendants-Appellees.

APPEAL from the United States District Court for the Western District of Michigan

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Decided and Filed March 18, 1981.

Before: WEICK, LIVELY and ENGEL, Circuit Judges.

PER CURIAM. The plaintiffs appeal from summary judgment in favor of the defendants in this action brought pursuant to 42 U.S.C. §§ 1983, 1985 and

1988 seeking a declaratory judgment, preliminary and permanent injunctions and money damages. In their complaint the plaintiffs alleged that the defendants, state officers, employees and agencies, had deprived them of a constitutionally protected "liberty" interest without due process of law. The liberty interest asserted by the plaintiffs arose out of "a viable familial relationship" which developed between the plaintiffs, their adopted son and two children who were placed with the plaintiffs as foster parents by the Probate Court of Ingham County, Michigan.

The first ground for reversal urged by the plaintiffs on appeal is that the district court improperly "converted" a motion by various defendants to dismiss the complaint under Rule 12(b)(6), Fed. R. Civ. P. into a motion for summary judgment pursuant to Rule 56, Fed. R. Civ. P. Upon consideration of the record

the court notes that at least one defendant also moved for summary judgment under Rule 56 and that the district court received matters outside the pleadings from various parties, including the plaintiffs. It is clear from the record that the plaintiffs were not taken by surprise as a result of the court's determination to treat the case as submitted for summary judgment and that they had adequate opportunity to present documentary materials to the court. See Kistner v. Califano, 579 F.2d 1004 (6th Cir. 1978). It further appears that the district court relied only on uncontradicted facts in reaching its determination that the defendants were entitled to judgment as a matter of law.

Though the plaintiffs invited this court to make a much broader determination on the question of whether foster parents have a constitutionally protected liberty interest in the relationship between

them and foster children placed in their homes, the court concludes that the present case may be decided on its particular facts and that a broader determination is not required. In this case the plaintiffs had only a six-month temporary license to conduct a foster family home at the time the two foster children were placed with them. Furthermore, the contract between the state agency and the plaintiffs placing the two children with the plaintiffs provided specifically that the state agency retained responsibility for permanent placement of the foster children. Under these circumstances, the court concludes that at most the plaintiffs had an expectation of continuing as foster parents of the two children in question and that this did not rise to the level of a constitutionally protected liberty interest. The district court also found that Michigan affords an adequate due process procedure before a foster

home care license may be revoked. The record supports this finding as well.

The judgment of the district court is affirmed.

STATE OF MICHIGAN

DEPARTMENT OF SOCIAL SERVICES

BUREAU OF ADMINISTRATIVE HEARINGS

IN THE MATTER OF: Wayne and Janet Sherrard,
Licensees
Reg. No. 79-08540(9002)
Case No. F7800854H

HEARING DATE: January 7, 1980
Shiawassee County DSS

ADMINISTRATIVE LAW JUDGE: JOHN N. ATKINSON

DECISION

The Opinion of the Administrative Law Judge and Recommendations in the above entitled matter have been read and considered, together with the entire record of the hearing. Said Opinion is attached hereto and made a part hereof. It is my decision that the Department in its efforts not to renew the foster care license, failed to act in substantial compliance with

applicable rules, and in particular Section 92 of the Michigan Administrative Procedures Act.

ORDER

Pursuant to 1973 PA 116, as amended, this matter is to be referred to the Family Home Licensing Division for further action to be taken by them as required by Section 92 of the Michigan Administrative Procedures Act.

John T. Dempsey /s/
John T. Dempsey, Director

Dated: 4/4/80

Date Mailed: Apr 9 1980

EXHIBIT "B"

NOTICE: The law provides that within 10 days of receipt of the above Decision and Order the claimant may appeal it to the circuit court for the county in which he lives.

cc: Wayne and Janet Sherrard

Fernando Gomez
Gerald Stevens
Shiawassee County DSS
Harold Gazan (3)
Judge John N. Atkinson
Administrative Hearings (4)

STATE OF MICHIGAN

DEPARTMENT OF SOCIAL SERVICES

BUREAU OF ADMINISTRATIVE HEARINGS

IN THE MATTER OF: Wayne and Janet Sherrard,

Licensees

Reg. No. 79-08540(9002)

Case No. F7800854H

Date: January 7, 1980

Time: 9:00 a.m.

Shiawassee County
DSS

OPINION OF THE ADMINISTRATIVE LAW JUDGE

ADMINISTRATIVE LAW JUDGE: JOHN N. ATKINSON

PRESENT AT HEARING: Fernando Gomez, Assistance Attorney General
David Fitzgerald, Family Services
Donald Peters, Attorney
George Hare, Attorney
Gerald Stevens, Attorney
Wayne Sherrard, Licensee
Janet Sherrard, Licensee

EXHIBITS ADMITTED INTO EVIDENCE

Department Exhibit - Brief of Assistant Attorney General

Claimant Exhibit - Brief of Licensees' Attorney Gerald M. Stevens

EXHIBIT "C"

This case is before the Administrative Law Judge pursuant to MCLA 722.121(2); MSA 25.358(21)(b) upon claimant's request for a hearing to protest the decision by the Director of the Department of Social Services (DSS) not to renew the foster home license. A preliminary hearing was scheduled on the above date to resolve procedural issues in accordance with MCL 24.280. The preliminary hearing determined that four issues were to be resolved but based upon this decision the following two issues are deemed to be the only two issues material to this case.

ISSUES

(1) Were the licensees given proper notice of the factual conduct upon which DSS is basing its action in not renewing the license?

(2) Have the licensees been given an opportunity to show compliance with

all lawful requirements for retention of their license?

SUMMARY OF THE EVIDENCE

The Sherrards were given a provisional foster care license in May, 1978, which was renewed on a provisional basis on 11/15/78, the provision being that psychological counseling be undertaken by the licensees because of emotional problems of William, a minor child already in the home.

As a result of the above license, two minor children were placed in the Sherrard's home. These children continued to live there until 5/14/79 when they were then taken by the DSS and placed elsewhere.

The Sherrards protest the children being removed from their home and also the procedure followed by the Family Home Licensing Division (hereinafter Licensing Division) a subdivision of

the DSS, in its actions leading up to the department's decision not to renew the license. The specific objections are the issues set forth above.

The Licensing Division utilized the Family and Child Service of the Capital Area, Inc. (hereinafter Family and Child Services) to oversee the Sherrard's foster home and to conduct specific investigations. The Family and Child Services is a private organization and is not in any way a part of the DSS.

Peggy Palmiter, an employee of Family and Child Services, investigated and reported for both provisional licenses. The reports reflected that William, the adopted son of the Sherrard's had emotional problems and as a result, psychological counseling was recommended for the family. Evidence suggests initial cooperation and a later failure by the licensees to continue with this recommendation.

The licensees were orally informed on 4/26/79, by Ellen Heater, an employee of Family and Child Services that their license would not be renewed on 5/14/79. No reason was given. It was on or about 5/14/79 that the two children were removed from the home and the reason given therefore was that the foster license would not be renewed.

On June 6, 1979, the licensees received a letter from Dr. Lucille K. Barber, then Acting Director of Family and Child Services, which stated in part, "We anticipate we will not renew your license for reasons described in Rules 15, 17, 25, and 33 of the booklet, 'Rules for licensing' issued by the State Department of Social Services. These rules refer to matters of Mental health, cooperation with the Agency and the needs of children, and matters concerning punishment. At our informal conference next week we can

discuss this further. If you have further questions regarding our assessment, please feel free to bring them up at our conference."

On June 5, 1979, a letter was directed to the licensees from the Licensing Division which offered an informal conference to discuss future licensing actions of the DSS. The letter in addition stated that the recommendations of Family and Child Services would be sought in regards to license renewal and the "rule related facts" upon which the recommendation would be based.

The licensees attended the conference with their attorney. At the preliminary hearing in this matter, the only person who offered testimony as to what transpired at that conference was the licensees' attorney who stated that nothing was said regarding the reasons for not renewing the license except that the license had expired.

On 9/14/79, a letter from John T. Dempsey to the Sherrard's specified the violations of four specific licensing rules and facts upon which the DSS felt supported its position. This letter further stated that the Sherrard's license would not be renewed and if they disagreed with this decision, an administrative hearing could be requested.

A request for a hearing was filed on 9/27/79.

The DSS's brief also contained reference to a 12/27/78 report which reflected certain rules and violations. The record is not clear as to what they may have been or who furnished it.

The licensees' position is that prior to receipt of the 9/14/79 letter, they did not specifically know why the DSS was refusing to renw their license and could not therefore rebut or correct them prior to the denial of the license.

The DSS's position is (1), that through the verbal and written communications with the licensees they had notice of the facts or conduct which warranted denial of the license or (2) if proper notice and opportunity to comply was not given, such was not necessary under the Michigan Administrative Procedures Act because of the psychological problem that allegedly exists which because of its nature could not be immediately corrected.

FINDINGS OF FACT

The Administrative Law Judge, upon the competent, material and substantial evidence on the whole record, finds the material facts to be as stated in the Summary of the Evidence.

CONCLUSIONS OF LAW

The Michigan Administrative Procedures Act, Section 92 requires the following:

> "Before the commencement or proceedings for suspension, revocation, annulment, withdrawal, recall, cancellation or amendment of a license an agency shall

> give notice, personally or by mail, to the licensee of the facts or conduct which warrant the intended action. The licensee shall be given an opportunity to show compliance with all lawful requirements for retention of the license. If the agency finds that the public health, safety or welfare requires emergency action and incorporates this finding in its order, summary suspension of a license may be ordered effective on the date specified in the order or on service of a certified copy of the order on the license, whichever is later, and effective during the proceedings. The proceedings shall be promptly commenced and determined."

It is clearly spelled out in the above section that the agency, in this case the DSS, is the moving party. The denial or revocation of a license is departmental prerogative. The act does not give the agency the right to assign to another the authority to cancel or deny a license. In the present case, therefore, it is the DSS's right to cancel the Sherrard's license, if appropriate, and the DSS must assume the responsibility of giving proper notice. No other

person or organization has this authority.

Thus, the alleged notices given by Ellen Heater and Dr. Lucille K. Barber, both employees of Family and Child Services were inadequate to properly advise the licensees of the DSS's proposed actions. It is not surprising that Dr. Barber's letter stated that she "anticipated" we will not renew your license for she has no authority to grant or deny the license. In addition, the letter from the Licensing Division to the licensees states that the Division will seek the recommendations of the Family and Child Services in making the license renewal decision.

Also, Ellen Heater, as a Family and Child Services caseworker, would not on her own even if she were a DSS employee, have the authority to decide the question of denial of the license to the Sherrards. Actions of Ellen Heater

could not bind the department. Thus, information furnished to the licensees by any one other than an authorized party of the DSS has no legal consequence in the department's action to deny the foster home license to the Sherrards. To decide otherwise would make the DSS responsible for actions of people over whom it had no control.

The 12/27/78 report, although not clear from the record, is believed to have been originated by the Family and Child Services and its effectiveness is governed by the reasons stated above.

The only other time the department claims the licensees were given notice was by the letter from the Licensing Division, dated June 5, 1979, and the conference of June 13, 1979.

This letter specifies no rule violation of any kind. Except for the introductory paragraph, names and the date of the

appointment, it is a form letter applicable to any situation.

It does state that the purpose of the proposed conference was to give the licensees an opportunity to show compliance. Therefore, the licensees must have been advised prior to the conference of any proposed rules violation for the letter to have any legal purpose.

In this case, they were not so advised. At the time of the conference, based upon the evidence presented at the hearing, the licensees did not know the specific violation the DSS was considering as a basis for the denial of the license. Thus, they did not know what evidence to obtain or present at the conference.

It also follows that the licensees were therefore not given an opportunity to show compliance.

The DSS also argued that Section 92 of the Michigan Administrative Procedures Act does not apply where the alleged

violation is one of an emotional nature, a problem not immediately correctible as would be a defective structure.

This argument is based upon the finding of an ex-party investigation. It presumes the existence of the defect and then continues the argument based upon the defects existence. If the defect does not exist, the argument based thereon falls. The question to be answered therefore in this type of case is whether the defect actually exists and if so, the degree thereof. The licensees should be advised of what the DSS is considering as a reason for denying the license so that the licensees are afforded the right to secure expert testimony to show either no emotional problem exists or, if it does, if it is of a minor nature. The question resolves itself to be one of proof.

RECOMMENDED DECISION

After a careful review of the entire

record of these proceedings and based upon the substantial credible evidence and the findings of fact and conclusions of law, the Administrative Law Judge recommends a finding that Section 92 of the Michigan Administrative Procedures Act was not complied with in that the licensees were not properly notified of the facts or conduct which warrant the denial of a foster home license. In addition, they were, therefore, not afforded an opportunity to show compliance with all lawful requirements for the retention of the license. It is further recommended this matter be referred to the Division of Family Home Licensing for further action.

John N. Atkinson /s/

John N. Atkinson,
Administrative Law Judge

Dated: 3-26-80

JNA:fgw

cc: Wayne and Janet Sherrard

Fernando Gomez
Gerald Stevens
Shiawasee County DSS
Harold Gazan (3)
Judge John N. Atkinson
Administrative Hearings (4)

STATE OF MICHIGAN

William G. Milliken, Governor
DEPARTMENT OF SOCIAL SERVICES
300 South Capitol Avenue, P.O. Box
30037, Lansing, Michigan 48909
JOHN T. DEMPSEY, Director

July 21, 1980

Mr. Gerald M. Stevens
Attorney at Law
319 East Main Street
Owosso, Michigan 48867

Dear Mr. Stevens:

This letter is to inform you of my decision with regard to the status of the foster home license issued to Mr. and Mrs. Wayne Sherrard, and to provide you with a brief summary of the bases for my decision.

First, I will summarize the purpose of the informal conference. The purpose of the informal conference was to carry out the intent of Dr. Dempsey's order that the matter of the Sherrard's license be referred back to the Division of Family Home Licensing for further action, which action is to be taken in accordance with

the provisions of Section 92 of the Michigan Administrative Procedures Act. This order was the result of the administrative hearing conducted on January 9, 1980. The administrative law judge concluded that the Sherrards had not been "afforded an opportunity to show compliance with all lawful requirements for the retention of the license."

It was my purpose in holding the informal conference to limit the focus of attention to the question of current compliance. Essentially, I was concerned as to whether there was evidence to indicate whether the Sherrards are in compliance as of this date. It was not my purpose in having the informal conference to evaluate and decide upon the merits of the findings of the Family and Child Service of the Capitol Area, Inc. (hereinafter referred to as the "Certifying Agency"). The intent of Dr. Dempsey's

order was to correct a procedural flaw in the handling of this matter.

Second, I will summarize those facts which entered into my consideration and became the bases for my conclusions and decision.

1. The Shiawassee County Department of Social Services has recently completed an evaluation and investigation of the Sherrard's home in response to an application the Sherrard's filed to operate a licensed family day care home.

Based upon a telephone conversation with Mrs. Whittaker on July 17, 1980, during which time she reviewed the file, I noted the following observations of the licensing worker:

- The references received regarding the Sherrard's are "very good."
- The medical report is "perfectly favorable."

- Mrs. Sherrard is described as "demonstrating know-how" in the handling of children.

- The rule compliance record does not indicate any area of substantial noncompliance or any area of concern. (It was pointed out to me that the local health department had not yet provided the licensing worker with the results of the water sample analysis.)

- The licensing worker also discussed with the Sherrard's the possibility of the home being used for short-term foster placements. In this connection, the record indicates that the worker saw "no reason to not use the home" for short-term foster care placement.

2. The psychological evaluation completed by Lawrence Cowan, Ph.D. (Clinical Psychologist) on October 5, 1979 indicates the following:

"I doubt, however, that any kind of therapy for Mr. and Mrs. Sherrard would show much benefit; first of all because they are not disturbed individuals; secondly, I don't think their values are consistent with seeking psychological help for themselves. If no treatment is forthcoming for William, I would still expect that he would continue to show improvement, since he has made significant improvement without this treatment over the past year."

3. The key document and source of evidence upon which the certifying agency based its recommendation of August 28, 1979 to refuse to renew the license predate the agency's recommendation of December 27, 1978 to issue a second provisional license.

Third, based upon the above stated facts, a careful review of the Department's record on this matter, and the information

shared during the informal conference, I make the following decisions:

1. To renew the foster family home license effective May 15, 1979.

2. To transfer the supervisory responsibility for the Sherrard foster family home from Family and Child Services of the Capitol Area, Inc. to the Shiawassee County Department of Social Services effective July 18, 1980.

3. To renew the foster family home license to a regular license status, based upon the fact that there is no evidence of substantial noncompliance, and in fact, evidence exists based upon a recent family day care home licensing study that there is reasonable compliance.

4. To request the Shiawassee County Department of Social Services to do a re-evaluation of the Sherrard foster family home within six months

to assure ongoing compliance with licensing requirements.

Please find enclosed a copy of the license which has been issued. The original is being mailed to the Sherrards.

If you have any questions regarding the contents of this letter or the decisions which have been made, please do not hesitate to contact me.

Sincerely,

Harold S. Gazan /s/

Harold S. Gazan, Director
Bureau of Regulatory
Services

HSG/mn
Enclosure
cc: Mr. and Mrs. Wayne Sherrard
Kenneth Phelps, Director
Family and Child Services of the
Capitol Area
David V. Lorion, Director
Shiawassee County Department of
Social Services
David G. Fitzgerald, Director
Division of Family Home Licensing
Fernando Gomez
Assistant Attorney General

STATE OF MICHIGAN
DEPARTMENT OF SOCIAL SERVICES
LANSING, MICHIGAN 48926
LICENSE FOR THE CARE OF CHILDREN

In accordance with Act 116, Public Acts of Michigan 1973, a REGULAR License is hereby issued to SHERRARD WAYNE & JANET to conduct a FOSTER FAMILY HOME located at 4103 EAST WILKINSON OWOSSO county of SHIAWASSEE State of Michigan. Provider number FH7800854

This license is issued to care for children described as follows:

NO MORE THAN 02 CHILDREN FULL-TIME CARE

This license, valid only at the address shown above, is nontransferable and remains the property of the Michigan Department of Social Services.

A substantial violation of the provisions of the statute under which this license is issued, or of any of the rules and

regulations adopted by the Department and published in the State Administrative code will be cause for revocation. Any previously issued license is invalid.

By John T. Dempsey /s/
DIRECTOR
Date of Issue 05-15-79

LICENSE SUPERVISED BY

SHIAWASSEE COUNTY
DEPARTMENT OF
SOCIAL SERVICES
1025 NORTH SHIAWASSEE STREET
CORUNNA, MICHIGAN 48817

Date of Expiration 05-14-81

PLEASE POST IN A CONSPICUOUS PLACE

SHERRARD WAYNE & JANET
4103 E. WILKINSON
OWOSSO, MICHIGAN 48867

[Form]
DSS-3703 (Rev. 2-75)
Previous Editions Obsolete

ROBERT L. DRAKE
DONALD S. OWENS
Judges

Warren Ritter
Director of Children's Services
Douglas W. Slade
Probate Register
Michael J. Moran
Court Administrator

300 Ingham County Building
303 W. Kalamazoo Street
Lansing, Michigan 48933
Telephone (517) 485-1751

County Courthouse
Mason, Michigan 48854
Telephone (517) 676-5222

STATE OF MICHIGAN
INGHAM COUNTY PROBATE AND JUVENILE COURT

August 19, 1980

Mr. Gerald M. Stevens
319 E. Main Street
Owosso, Michigan 48867

Re: Wayne and Janet Sherrard

Dear Mr. Stevens:

Thank you for your letter of July 23, 1980, enclosing certain materials from the Department of Social Services. After reviewing them carefully, I will refer them to the caseworkers.

Sincerely yours,

Donald S. Owens /s/

DONALD S. OWENS
Judge of Probate

DSO/jll

EXHIBIT "B"

LAW OFFICES

GERALD M. STEVENS

319 East Main Street

OWOSSO, MICHIGAN 48867

TELEPHONE 725-5161

AREA CODE 517

August 26, 1980

Honorable Donald S. Owens
Ingham County Probate Court
303 West Kalamazoo
Lansing, MI 48933

RE: CANDACE AND VERNITA SMITH
WAYNE AND JANET SHERRARD

Dear Judge Owens:

Following your letter of August 19, 1980, I talked to Sue Boyd on August 26, 1980, in the absence of Elaine Ball. She indicated Jeff Venn is the caseworker. She further indicated that one of the girls is in psychological care and she would not recommend transfer to another home. I asked if the Sherrards could not follow through on the psychological

EXHIBIT "C"

care. She said it was too far and also there were negative results from the last contact with the foster parents.

I indicated the negative results were testified to in court on the basis of what the foster parents said when the parent was not available for examination. She indicated Mr. Venn had personally seen the results. This is contrary of my recollection of his testimony.

She further indicated the report from the Department of Social Services indicated William had improved since the girls had left. The report does not say this, nor did the evidence show anything other than continual improvement from the day of placement of the girls with the Sherrards.

She indicated she would be interested in further investigation only when the children are legally ready for adoption and on order of the court.

I pointed out whatever reasons were extant in the past which came from Family and Child Services were refuted by the Department of Social Services' finding. She offered no other reasons than those I have just set out.

Time is marching on unmercifully and for the benefit of all, and the children especially, the matter should be resolved. I would appreciate some indication or suggestion from you.

Thank you for your cooperation.

Very sincerely yours,

Gerald M. Stevens /s/

Gerald M. Stevens

GMS/jab

cc: Mr. and Mrs. Wayne Sherrard

Office-Supreme Court, U.S.
FILED
JUN 5 1981
ALEXANDER L. STEVAS,
CLERK

80-1998

No.

IN THE
SUPREME COURT OF THE UNITED STATES

APRIL TERM 1981

WAYNE SHERRARD AND JANET SHERRARD, his wife,

Petitioners,

v.

DONALD S. OWENS, Judge of Probate, Ingham County Probate Court,

et al.,

Defendants.

SUPPLEMENT TO APPENDIX

Gerald M. Stevens
Attorney for Petitioners
319 East Main Street
Owosso, Michigan 48867
(517) 725-5161

This supplement contains the district court opinion as reported at 484 F. Supp. 728 (W.D. Mich. 1980).

Wayne Sherrard and Janet Sherrard,
his wife, Plaintiffs,

v.

Donald S. Owens, Judge of Probate Court, Ingham County, Lansing, Michigan; Michigan Department of Social Services, Family and Child Services of the Capitol Area, Inc.; Lucille Barber, Individually and as Employee Acting Director and Board Member of Family and Child Services of the Capitol Area, Inc.; Mary Ellen Heater, Individually and as Employee of Family and Child Services of the Capitol Area, Inc.; Barbara McLean, Individually and as Employee of Family and Child Services of the Capitol Area, Inc.; Timothy G. Holland, Attorney at Law, Individually and as guardian for Candace and Vernita Smith, Minors, Jointly and Severally, Defendants.

No. G79-482 CA5.

United States District Court,
W.D. Michigan, S.D.

Jan. 14, 1980.

Gerald M. Stevens, Owosso, Mich., for plaintiffs.

Timothy G. Holland, John F. Fuzak, Frank J. Kelley, Atty. Gen., Lansing, Mich., for defendants.

OPINION AND ORDER

DOUGLAS W. HILLMAN, District Judge

I.

Plaintiffs, Wayne Sherrard and Janet Sherrard ("Sherrards"), moved for declaratory relief and a preliminary injunction enjoining defendants from taking any further action with respect to two foster minor children, Candace and Vernita Smith. Plaintiffs further seek a writ of Habeas Corpus to produce the children and return them to plaintiffs. The complaint prays for damages in the amount of $615,000. The complaint, which was filed on August 16, 1979, names the following defendants: (1) Donald S. Owens, Judge of Probate Court, Ingham County, Lansing, Michigan; (2) Michigan Department of Social Services (hereinafter "DSS"); (3) Family and Child Services of the Capitol Area,

Inc. (hereinafter "FCS"); (4) Lucille Barber, Director of FCS; (5) Mary Ellen Heater and Barbara McLean, case workers of FCS; and (6) Timothy G. Holland, Attorney at Law and Guardian of the minors, Candace Smith and Vernita Smith.

Defendants have moved to dismiss and plaintiffs have countered with a motion to add additional parties defendants. The hearing on all pending motions was held on November 9, 1979. Prior thereto (August 23, 1979), then Chief Judge Noel P. Fox of this court issued a temporary restraining order, restraining all of the defendants from further "changing the physicial custody or legal disposition of the children, Candace and Vernita Smith, until such time as there has been a full adversary hearing on the merits and the question of removal of the children from the foster home of the plaintiffs, or until further order of this court." The two

foster children had been removed from plaintiffs' home and placed in another foster home on May 15, 1979.

On November 5, 1979, this case was assigned to me by Judge Fox, and a hearing in open court on all pending motions was held November 9, 1979.

Jurisdiction is claimed under Title 42, U.S.C. 1983, 1985, 1988; also Title 28, U.S.C. 1331, 1343, 2201, 2241, 2251 and further, that removal of the two foster children from plaintiffs' home violated the Due Process and Equal Protection Clause of the Fourteenth Amendment.

The saga of these two unfortunate children began in the Probate Court for the County of Ingham, State of Michigan on May 12, 1977, when Elaine R. Thomas, a Children's Protective Services Social Worker, employed by Michigan Department of Social Services, presented petitions to a probate court referee alleging

that the Probate Court had jurisdiction over Candace Smith, born October 31, 1973, and Vernita Smith, born February 28, 1976, under the terms of M.C.L.A. § 712A.2(b)(1), which provides among other things that the Probate Court shall have jurisdiction over any child found within the county:

> "whose parent or other person legally responsible for the care and maintenance of such child, when able to do so, neglects or refuses to provide proper or necessary support, education as required by law, medical, surgical or other care necessary for his health, morals, or who is deprived of emotional well-being, or who is abandoned by his parents, guardian or other custodian, or who is otherwise without proper custody or guardianship."

In support of her petition, Elaine

Thomas alleged, in two separate identical petitions in the name of each child, that the children had been left with the paternal grandmother because the mother, Vicki Smith, "had purchased a car with her ADC grant" and, therefore, "did not have food for the children." It was further alleged in the petition that while the children's father had been living in the home of his parents, he had at some time earlier left the home, thereby leaving the children without proper custody as both of their parents had abandoned them.

The referee, finding that sufficient grounds existed to justify formal court inquiry, authorized Miss Thomas to file the petition and then set the matter for pre-trial conference before the Judge of Probate for June 13, 1977.

The referee's initial order provided in pertinent part as follows:

"IT IS ORDERED, that filing of said petition is authorized, that Monday, June 13, 1977, at 8:30 a.m. at the courtroom, 608 S. Washington Avenue, Lansing, Michigan; is assigned for hearing thereon, and that Dorinda VanKempen, Family and Child Services, is appointed to investigate and make recommendations to the Court.

IT IS FURTHER ORDERED, that said minor be placed in the care and custody of the Director of Children's Services for placement in the Juvenile Home, her own home, a relative's home, a licensed boarding home, or any other such placement deemed necessary for the health and welfare of said child pending final disposition of said case, or until further order of the court with authority also to provide medical and psychological care.

* * * * * * *

IT IS FURTHER RECOMMENDED, that the parents of said minor, Garold and

Vickie Smith, are to keep Family and Child Services and Ingham County Probate Court informed of any change in their addresses or living situation. IT IS FURTHER RECOMMENDED, that visitation with said minor by her parents shall be arranged by Family and Child Services."

The "Director of Children's Services" is the office referred to in the statute, M.C.L.A. § 712A.8 as the "county agent" or "juvenile probation officer". He is the administrator responsible for the court's staff of social workers who administer cases within the court's jurisdiction. The Director of Children's Services is appointed by and is directly responsible to the Probate Judge. He receives his funding from the county board of commissioners.

Notwithstanding the fact that the court operates its own staff of social workers under the direction of the Director of Children's Services, the court has contracted

with a number of independent local agencies for administrative services in connection with the care of neglected and abused children. Cases are referred to the independent agencies on a random basis, depending on Court docket numbers assigned when cases are opened. Family and Child Services, referred to in the referee's initial order, quoted above, is one of the independent contracting agencies. Also, Dorinda Van Kempen, referred to in the first paragraph of this order, was a social worker employed by Family and Child Services. It appears, however, that the case was not assigned to her as contemplated, but, rather, the agency assigned the Smith case to Ellen McKay, another social worker employed by that agency.

The referee ordered that counsel be appointed both for the natural mother and for the natural father and, in addition, ordered that a guardian ad litem be appointed to represent the interests of the children.

Timothy G. Holland, attorney at law, resides in Lansing, Michigan, and was appointed guardian ad litem by the Probate Court on May 23, 1977.

A hearing on the petition was held before the Probate Judge on June 13, 1977. At that hearing, the natural mother was not present but the natural father appeared and announced that he desired to contest the petition. The court set the matter for trial on July 15, 1977. On that date, the mother of the children was not present in court and the contested hearing was adjourned until October 13, 1977. However, before adjournment on July 15, the court took testimony concerning the guardian ad litem's continued objection to the children remaining at the residence of the paternal grandparents. After taking of testimony, from two social workers, the court removed the children from the home of the grandparents and placed the children in the licensed foster home of Mr. and Mrs. Frank

Brown of Leslie, Michigan.

Before the October 13 trial could be held, counsel for the natural father entered a motion to dismiss the neglect proceedings on the grounds that the Circuit Court, by reason of a complaint for divorce filed October 20, 1976, by Vickie Smith, had prior and continuing jurisdiction over the children. The Probate Court denied the father's motion to dismiss on August 30, 1977. The father appealed to Circuit Court. The October 13 trial was adjourned, pending the appeal.

In May of 1978, Ellen McKay, the caseworker at that time responsible for the welfare of the children, learned that changed conditions in the Brown home prevented them from continuing to care for the children. Consequently, this caseworker asked the Probate Court to remove the children from the Brown home and to authorize their placement in the foster care of the plaintiffs, Wayne Sherrard and Janet Sherrard of rural

Owosso, Michigan, who had just been provisionally licensed by her agency, Family and Child Services of Lansing, Inc., and the Michigan Department of Social Services. As a result, Candace Smith and her sister, Vernita Smith, were placed in the Sherrard home by order[1] entered May 15, 1978. (The Sherrard provisional foster home license was granted initially for six months commencing May 15, 1978.)

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1. The Order reads as follows:

"In furtherance of an order dated July 15, 1977, and the petition of Ellen McKay, Juvenile Court Officer it now appearing the best interests of said minor(s) and of the parties interested will best be served thereby,
IT IS ORDERED that the placement of said minor(s) be and is hereby changed from:
Mr. and Mrs. Frank Brown (F.H.)
10604 Preston Road
Horton, Michigan 49246
TO:
Mr. and Mrs. Wayne Sherrard
4103 Wilkinson Road
Owosso, Michigan 48837

IT IS FURTHER ORDERED that such placement shall continue until the further Order of the Court.

Dated: May 15, 1978

/s/ _____

DIRECTOR OF CHILDREN'S SERVICES"

On August 23, 1978, the Circuit Court entered its opinion and order affirming the order of the Probate Court holding that it (the Probate Court) had jurisdiction over these children despite the pendency of a divorce proceeding in the Circuit Court. Thereafter, the Probate Court set the matter for further pre-trial on October 16, 1978. At that time, the court set the matter for jury trial to begin on December 18, 1978, a jury having been demanded by counsel for the mother. The trial was adjourned until September 15, 1979.

On February 14, 1979, the father entered a nolo contendere plea to the petition against him. This plea was accepted by the Honorable Robert J. Barber, a visiting probate judge. Judge Barber then began consideration of the motion of the mother's attorney to withdraw on the grounds that his client had failed to cooperate with him. Judge Barber adjourned hearing of this motion until February 22, 1979, to provide for

actual service on the mother and to provide her the opportunity to object to withdrawal. As the mother failed again to appear on February 22, 1979, the court permitted the mother's attorney to withdraw. The court then ordered that alternate counsel be appointed for the mother and that the matter be set for jury trial on the allegations against the mother on March 16, 1979.

On March 16, the mother did appear and the jury trial was held. The jury found from the facts that the allegations in the petition were true and, thereafter, Judge Barber entered his order taking jurisdiction over the children. That still left open the question of what disposition should be made with respect to the children and at the close of the trial, the court set May 29, 1979, as the date for the hearing on the disposition issue. At that time, the mother appeared but the father did not. It was the position of the state at that hearing that termination of the rights

of both parents was in the best interests of the children. Judge Owens held that the state had sustained its burden of proof and entered an order on June 12, 1979, terminating the rights of the natural parents in Candace and Vernita Smith. Both parents, thereafter, were notified of their right to appeal and, also, their right to counsel as well as a right to a complete transcript at no cost if they were indigent. No appeal was perfected from the order terminating parental rights in Candace and Vernita Smith. Likewise, neither parent petitioned for rehearing within the three month period following termination of their rights. Consequently, at the time the present suit was filed in the Federal Court, Probate Court had completed the statutory process for terminating the rights of the parents and, as a result, the court was free to place these children for adoption under the Michigan statute.

Meanwhile, as previously indicated,

the children were placed in the Sherrard home on May 15, 1978. The Sherrards had been licensed as foster parents as of that same date. Initially, by virtue of M.C.L.A. § 722.117, a provisional license is issued during the first six months of operation. In this particular case, at the end of the first six months the license was extended for an additional six month period rather than the issuance of a "regular" two-year license. It is apparent that certain emotional and physical problems existed in the Sherrard home during this one year "provisional" period when the Smith girls were in the residence. The Sherrards have one adopted son, William, who at that time was eight and a half years old. He had been adopted at age five and has had severe emotional problems. In a detailed and thoughtful report[2] on the Sherrard home dated

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2. RE: Wayne & Janet Sherrard

WORKER: Peggy Palmiter

AGENCY: F & CS, Ingham
DATE: January 5, 1979

RENEWAL STUDY

Wayne and Janet Sherrard were licensed as foster parents with this agency as of May 15, 1978. The Sherrards are a rural family, located in Owosso, Michigan. They reside on a large dairy farm, which is also their total livelihood. Their home is extremely large and old, and they have gradually been remodeling and redoing it. Due to the size of the home, they have been licensed for four children. Wayne and Janet Sherrard have one adopted son, William, who is 8½ years old. He was adopted at age 5 and has had serious emotional problems. During our licensing process, William seemed to be functioning well and the family was encouraged at his progress. The Sherrard family had received some counseling help following the adoption and all had been involved through Mental Health Services approximately a year ago. It was Mr. and Mrs. Sherrard's opinion, in May, that William was adjusting well and that many of his acting out behaviors had ceased. They felt that he was well integrated into their family and that the introduction of other

children into the home was an advantage for him as well as for them. In my discussions with the family, as well as with William, I agreed with their perceptions. Candace and Vernita Smith, 5 and 2 years old respectively, were placed in the Sherrard foster home on May 15, 1978. Both of these children are difficult children in that they have emotional problems and have experienced many changes leading to anxiety and insecurity. The Sherrards have handled the placement of the two children extremely well, in our opinion. We felt that the family has functioned relatively smoothly and that they have dealt with some of the emotional trauma of the girls in an extremely appropriate and understanding manner. In fact, we continue to be impressed with the Sherrards ability to handle children with emotional problems and their ability to persevere under extremely trying circumstances.

On October 10, 1978, this worker received a call from Ann Avellar, from Protective Services in Shiawassee County. Ms. Avellar indicated that William's school had contacted them and filed a suspected child abuse report. The school had indicated that William had substantial bruises on his

back and legs. This worker talked at great length with Ms. Avellar, as well as Mrs. McKay, the placement worker from this agency.

On October 11, 1978, I talked with Mrs. Sherrard, both on the phone and in person. She was extremely distressed about the complaint having been filed and was obviously distraught about the situation with William at the present time. She did indicate that William was becoming difficult to control and that she had spanked him with a fly swatter on the date before the complaint was made. She also indicated to me that she had no idea that such a spanking had created the marks that the school was complaining about and did not feel that she had punished him in the extreme in a physical manner.

In my discussions with Mrs. Sherrard, several things became extremely evident. First, it became clear that William has severe emotional problems. It also became very clear that they have received minimal, at best, assistance with these problems. Mrs. Sherrard indicated to me that William has been involved in several behaviors in the last few weeks that worry them immensely. He pounded nails in the side of the camper. He tried to pound

a screwdriver in a 220 fuse box. He basically has been involved in many behaviors that cause the family to worry about his physical safety. Hence, it becomes more and more imperative to Mr. and Mrs. Sherrard that he respond when they insist that he cease a particular behavior, since it is their belief that such response may in the very near future be what saves his life.

I use these examples only to point out the degree of concern that the Sherrards have in regard to William's emotional state at the present time. They have continually sought assistance in dealing with this child, i.e. Mental Health Counseling and work with the adoptions worker from the Department of Social Services. In my discussions with them, they have indicated that William was placed to them with minimal post-adoptive supervision, as their placement worker left the agency shortly after William's placement. It is also clear that no subsity was arranged for this adoption and any financial burden incurred in William's need for treatment must be incurred by the Sherrard family. It became very clear to me that they are not in a financial position to afford a great deal of therapeutic help for the child. In view of all of the limitations with in

which they were working, I think the Sherrards have done an admirable job and have made every effort to obtain appropriate medical and psychological assistance. However, to expect a family to deal with a child like William, whose background history is extensive, without proper assistance and support is ludicrous. I talked with Mrs. Sherrard throughout this entire process of the P.S. investigation as well as Ms. Avellar. Through this conversations [sic] it became clear that there was no major medical finding in regards [sic] to William's health. The doctor did indicate that he found bruising and he found bruising that he felt could not have been caused by any other way than having been inflicted upon him. He did indicate that there was no other medical or physical problem however. In my discussions with Ann Avellar and Mrs. Sherrard, we all agreed that an extensive evaluation was necessary for William and that this assistance and evaluation should begin as soon as possible. Through several following contacts, I did learn that an appointment was arranged for Mrs. Sherrard and William to be seen at Michigan State University Clinic.

In attempting to pursue the Protective Services case in this manner, I have had a great deal of difficulty. It is my understanding that Ann Avellar has left the

division of Protective Services in Shiawassee County and we have received no copy of the report from Michigan State University. Ms. Avellar's supervisor did indicate that when such a report was forthcoming, he would provide us with a copy. Mrs. McKay, placement worker in this agency, and myself were extremely concerned about the status of the Sherrard family, both in general and as a foster family. We both felt that the removal of the foster children would affect the situation adversely at the present time. William's self image is extremely bad and the removal of the children would be internalized by him and contribute to an already dangerous problem. Also, from the perspective of Candace and Vernita themselves, they have found a somewhat stable positive and nurturing environment, which it was our feeling would be damaging for them to have to relinquish at this time. We began working with the Sherrard family to determine what kinds of supportive services could be offered, both to assist in dealing with William and prevent the removal of foster children.

Ironically enough, Mrs. McKay had begun an adoptive study on the Sherrard family, as they had applied several years ago with

the agency, at approximately the same time as the Protective Services complaint was filed. Mrs. McKay has had opportunity to talk with many people who are familiar with the Sherrard family in the course of this adoptive study investigation. The most significant contact that Mrs. McKay has had, up to the present time, is with the school system. Mrs. McKay did talk to the school principal who was involved in the initial filing of the complaint. At first he was hesitant, as he has heard nothing from Protective Services as to the outcome of his complaint. Mrs. McKay indicated that we were aware of that complaint and that we were following through on the complaint. He then talked freely with her about the fact that William is in fact an extremely difficult child and that they have had no other difficulties with the Sherrard family up until this point. As we had received no report on an evaluation of William from Protective Services or Michigan State word went back to the school that this was something that we felt was necessary. Fred Beach, social worker for the intensively emotionally impaired, has begun working with the family and is beginning to set up testing for William in regards to emotional and organic problems. There's a potential

that William will be placed in a special classroom for the emotionally disturbed and Mr. Beach has been extremely helpful to the entire Sherrard family.

At this point, we have made several conclusions in regard to this foster home. First, it would be our recommendation that they remain licensed, with the children that are in their home presently left in placement there. The Sherrards are eligible at this time for renewal from a provisional to a regular license. In my discussions with Mrs. Sherrard and agency personnel, it is my feeling that our best recommendation at the present time would be for a renewal to a second provisional. It is my opinion that the area of non-compliance would be related to rule 15 stating that all members of the family should be in such physical and mental health as will not adversely affect the health of the child or quality or manner of his care. At this point, it is our feeling that we are unclear about the emotional stability and health of William and how that is affecting the entire functioning of the Sherrard family. It's true, in our opinion, that William does have serious emotional difficulty, but it is also our opinion that what course of action is going

to result in the best benefits for all concerned around that emotional stability is still an issue. Therefore, it is our recommendation that this family be licensed with a second provisional license in order to more fully evaluate and look at William's difficulty and the appropriate kinds of courses of action to assist both William and his family. I am aware that a recommendation to a second provisional necessitates an intention to correct letter, which Mrs. Sherrard has indicated she is totally willing to sign. The letter would basically cover the types of work that will be done with the family and with this agency between now and six months from now.

/s/ Peggy Palmiter MSW
Peggy Palmiter, MSW
Caseworker: (jh) 1-5-79
Reviewed by: /s/ MSW Date 1-5-79

January 5, 1979, entitled, "Renewal Study," caseworker Peggy Palmiter reported that the Sherrards had received some counselling following the adoption and that the family was of the opinion that the introduction of the two Smith daughters had been advantageous to the overall family situation. Nevertheless, it was reported that the Smith girls themselves (not unsurprisingly) had shown evidence of anxiety and insecurity. Initially at least, the caseworker was impressed with the Sherrard's ability to handle the children. Thereafter, the caseworker received a call of suspected child abuse. (A school teacher had reported that the Sherrard boy had exhibited substantial bruises on his back and legs.) Further conference with the Sherrards demonstrated a continuing series of problems with respect to William. He had been involved in several acts of anti-social conduct, such as pounding nails into the side of a camper and attempting to pound a screwdriver in a 220 fuse box.

The marks on his back apparently had been caused when he was spanked by Mrs. Sherrard with a fly swatter. Despite the spanking, the caseworker continued to be supportive of the Sherrards in their efforts to obtain assistance and counseling in the handling of William. However, due to their limited financial resources, she concluded that it would be impossible to expect any major improvement in William's behavior without further expensive counseling and assistance, but which services did not appear to be available. The January 5 report concluded by pointing out that the six month provisional license was about to expire (technically it expired on November 15, 1978) but since Rule 15 of the agency's regulations requires that "all members of the family should be in such physical and mental health as will not adversely affect the health of the child or quality or manner of his care", a serious doubt existed whether the Sherrard home met the standards for a permanent license.

Consequently, it was recommended that the provisional license be extended for an additional six month period "in order to more fully evaluate and look at William's difficulty and appropriate kinds of courses of action to assist both William and his family." The report concludes that the Sherrards were advised that a second six-month extension of the provisional license required an "intention to correct" letter which Mrs. Sherrard was willing to sign. The provisional license presumably on the recommendation of Ms. Palmiter's report was extended to May 15, 1979. However, as the May 15 deadline approached, the then caseworker in charge, Mary Ellen Heater, became progressively concerned with the Sherrard home. On May 12, 1979, Ms. Heater obtained an ex parte order from Donald S. Owens, Judge of Probate, changing the placement of the children from the Sherrard home to that of Mr. and Mrs. Edward Campbell of Lansing, Michigan. In her petition, Ms. Heater

alleged that it was her judgment that it would be in the best interests of the children to be removed from the home of the Sherrards "because of adjustment problems on the part of the Sherrard son" and further because her agency was not recommending renewal of the Sherrard's provisional foster care license. The language in the petition signed by Mary Ellen Heater and approved by her supervisor, Lucille K. Barber, reads as follows:

> "Because of adjustment problems on the part of the Sherrard's son, Family and Child Service is not recommending renewal of this family provisional foster care license. License expires 5-14-79."

Following the issuance of the order of removal dated May 15, 1979, the Smith girls were moved to the foster home of Mr. and Mrs. Edward Campbell.

It should be noted that at the time the Smith sisters were initially placed in the Sherrard home a written contract was entered into between Mr. and Mrs. Sherrard and the placement agency, the Child and Family Services of Michigan, Ingham County Branch. Among other provisions in this agreement, the Child and Family Services of Michigan agreed to assume the responsibility "to determine permanent plans for the child and to work out plans with natural and adoptive parents."[3]

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3. CHILD AND FAMILY SERVICES OF MICHIGAN

[Ingham County] BRANCH

AGREEMENT WITH FOSTER PARENTS

As foster parents for children under the supervision of Child & Family Services of Michigan we agree to the following:

I. Responsibilities of Foster Parents:

A. We will keep all information concerning the child and his family CONFIDENTIAL.

B. As long as we are licensed by Child And Family Services of Michigan we will not take a child from any other source without permission of Child And Family Services of Michigan.

C. When the child becomes ill or suffers a physical injury we will notify the agency. In a situation of emergency we will seek medical care from the child's regular physician if possible, otherwise we will use the best medical service available and we will contact the agency promptly.

D. As foster parents, one of us will accompany the child for doctor's appointments.

E. We will provide:

(1) Shelter and food, including formula.

(2) Care and Supervision 24 hours per day.

(3) The necessary home equipment and supplies such as, furniture, laundry, bedding and toilet articles such as soap, lotion, powder etc.

II. Responsibilities of Child And Family Services of Michigan.

A. To determine permanent plans for the child and to work out plans with

natural and adoptive parents.

B. To provide consultation, support and assistance to foster families while the child is in foster care.

C. To pay the foster parents_____ for each night a child is in their home. (Payments to be made monthly).

D. To pay for clothing, medical care, prescriptions (including vitamins) bottles and nipples and any special equipment which is necessary due to an individual child's needs.

[Janet Sherrard]
Wife

[Wayne Sherrard]
Husband

[Peggy Palmiter]
C.F.S.M. Representative

[4-11-78]
Date
FC-14

Following the removal of the children from the Sherrard home on May 14, 1979, the Sherrards, through their attorney, filed with the Department of Social Services a formal administrative hearing complaint against Family and Child Services of the Capitol Area, Inc. In their- [sic] complaint, the Sherrards claim (1) the children had been removed because the agency had difficulty serving children in foster homes in Owosso; (2) the agency arbitrarily and capriciously reversed their prior plans to keep the children in the Sherrard home; (3) the children were abruptly moved without adequate explanation and without consideration of the children's needs and (4) the agency abused fair licensing practices in not providing the Sherrards with license renewal application nor advising them of the legal basis for the recommended change in their license status. Upon receipt of the complaint,

David Fitzgerald, Director of Family Home Licensing Division, arranged for an informal conference in his office on June 13, 1979, at which time the Sherrards appeared with their attorney. Thereafter, an investigation was undertaken and in a report dated August 31, 1979,[4] Jerome L. Liebrecht, Consultant to Children's Agencies, rejected each of the Sherrard's

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4. STATE OF MICHIGAN

WILLIAM G. MILLIKEN, Governor
DEPARTMENT OF SOCIAL SERVICES
300 South Capitol Avenue, P.O. Box 30037,
Lansing, Michigan 48909
JOHN T. DEMPSEY, Director
August 31, 1979

Mr. Kenneth Phelps, Acting Director
Family & Child Services of the Capitol Area
300 North Washington Avenue
Suite 102
Lansing, Michigan 48933

Dear Mr. Phelps:

As you have been made aware, allegations have been made that Family & Child Services of the Capitol Area has violated administrative rules for child placing agencies. These allegations were made by Wayne and Janet Sherrard through their attorney, Gerald M. Stevens and were received in my office on June 22, 1979. Act 116, P.A. of 1973, as amended, "An act to provide for the protection of children" requires the Michigan Department of Social Services to investigate allegations of violations of administrative rules for child care organizations, including child placing agencies. The Division of Child Welfare Licensing investigated the allegations made in this case on June 25 and 26, 1979. These allegations and the findings of the complaint investigation follow.

1.) Allegation: Mr. Stevens has reason to believe that the children were removed because the agency has difficulty serving children in foster homes in Owosso. The community is too far distant from the agency headquarters.

Finding: A review of this case did not support the allegation that the community was too distant from the agency for the children to receive services. The agency was found in compliance with administrative rule 400.143 which requires that the agency clearly define its purpose and functions and the geographic area to be served.

2.) Allegation: (A) Mr. Stevens contends that the home conditions had not changed and that the agency arbitrarily and capriciously reversed their prior plans to serve the children in the Sherrard home.

Finding: The evaluation disclosed that the decision to remove the children was in fact based upon significant and substantial information which supported the agency's decision. Based on the information the agency had on the children and the foster family, the decision to remove the two foster children was a reasonable decision and the agency is therefore in compliance with administrative rule 400.158(d) which requires that the

agency evaluate the past experiences and problems of the child to determine the placement or service best suited to meet his needs. This documentation was found to comply with the requirements of administrative rule 400.172 which requires that the agency maintain foster home records including periodic reevaluations of the foster home.

Allegation: (B) The Sherrards had been verbally advised of approval for adoptive placement and that the agency did not follow through with such a placement.

Finding: There was no record of administrative approval by Family & Child Services administration of an evaluation for adoptive placement into this home. The home cannot be considered approved for adoption without such approval. Thus, there is no violation of administrative rule 400. 162(4) which requires that an agency not make a placement for adoption unless an evaluation of the child has been made and recorded. An evaluation is not considered approved or denied without agency administrative approval.

3.) Allegation: Mr. Stevens contends that the children were abruptly moved without adequate explanation and without consideration of the children's needs.

Finding: The case record indicates that the children were not abruptly moved without adequate explanation and without consideration of the children's needs. Therefore, the agency is in compliance with administrative rule 400.158(2), relating to preparation of children for placement changes and the sharing of information with the children as appropriate for their ages.

4.) Allegation: Mr. Stevens contends that the agency abused fair practices that he feels must be embraced in licensing rules and statutes. The children were removed on the day of license expiration with an explanation that the children could not remain in an unlicensed home. The Sherrards were not provided with license renewal applications nor were they clearly informed of the legal base for any recommended change in their license status.

Finding: The evaluation did not disclose any arbitrary and capricious actions on the part of the agency, but rather the actions were considered and planned. Other issues raised in the allegation are beyond the scope of child placing agency rules and therefore were not considered in the investigation as being within the authority of this Division.

It is, therefore, the conclusion of the Division of Child Welfare Licensing that Family & Child Services of the Capitol Area did not violate administrative rules for child placing agencies relating to the allegations made in this complaint. Therefore, it is recommended that the regular license for Family & Child Services be continued for placement of children in private homes for foster care and adoption.

Thank you for your cooperation in this investigation. Please contact me if you have questions relative to these findings or the recommendation.

Sincerely,

/s/ Jerome J. Liebrecht
Consultant to Children's Agencies

JJL/di

cc: Gerald M. Stevens, Attorney
Larry D. Miesner, Supervisor
Division of Child Welfare Licensing

charges. In essence, Liebrecht found the decision to remove the children had been based on significant and substantial information; that the decision of removal was a "reasonable one" and in compliance with Administrative Rules; that the children's needs were paramount in the removal decision and further that the removal was neither arbitrary nor capricious, but to the contrary, the actions were "considered and planned". The report concluded that the Family and Child Services of the Capitol Area, Inc., did not violate any of the department's administrative rules, and that its regular license for placement of children in private homes for foster care and adoption be continued. Thereafter, the Sherrards received a certified letter[5] under date of

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5. STATE OF MICHIGAN
WILLIAM G. MILLIKEN, Governor
DEPARTMENT OF SOCIAL SERVICES

300 South Capitol Avenue, P.O. Box 30037,

Lansing, Michigan 48909

JOHN T. DEMPSEY, Director

September 14, 1979

CERTIFIED MAIL

Mr. and Mrs. Wayne Sherrard
4108 E. Williamson
Owosso, Michigan 48867

Dear Mr. and Mrs. Sherrard:

The Family and Child Services of the Capitol Area, Inc. has recommended that your license to operate a foster family home not be renewed. I have reviewed their report carefully and agree with the recommended action. This letter will serve as the Department's official notice of refusal to renew action which is based on the following violations:

Rule R400.193(15) Regarding the requirement that all members of the household be in such mental health as will not adversely affect a foster child.

Rule R400.193(16) Regarding the

[Footnote 5 continued]

requirement that relationships within the family shall be such that a wholesome atmosphere will be assured for foster children.

Rule R400.193(17) Regarding the requirement that foster parents shall be of suitable temperament to care for children, shall understand the needs of children, and shall be willing to cooperate fully with the supervising agency.

Rule R400.194(33) Regarding the requirement that child training shall be handled with sympathy and understanding. Severe corporal punishment shall be a basis for license revocation.

Concerning Rule R400.193(15), the report states that noncompliance is based on information gathered from several sources. The EPPC (Educational Planning and Placement Committee) report dated June 5, 1979 done by the Shiawassee Intermediate School District, diagnoses your adopted son William as emotionally impaired. A report from Dr. R. E. Harder, MSU Pediatric Psychology Intern, dated March 9, 1979, recommended individual therapy for William and therapy for Mrs. Sherrard focusing initially on

parenting but moving toward other concerns she may have. A report from H.C. Tien, M.D., dated June 15, 1979, recommends both individual and family therapy for a trial period of three to six months at which time is [sic] to be reassessed, and possible continuation of therapy for one to three years.

Concerning Rule R400.193(16), the report indicates that three separate people were advised by you that, when problems arose with William that affected the placement of your foster children, you were willing to relinquish the guardianship of William.

Concerning Rule R400.193(7), the report finds that you are unwilling to abide by all terms of the agreement you had with the licensing agency in regard to the issuance of your second provisional license, November 15, 1978. Additionally, you did not follow through on appointments at Michigan State University and Shiawassee County Mental Health Center.

Concerning Rule R400.194(33), the agency reports that on one known occasion you had disciplined William so

severely that bruises resulted and those bruises were verified by a doctor in the emergency room of Owosso Memorial Hospital.

These serious and substantial deficiencies lead me to the conclusion that I have no other recourse at this time but to refuse to renew your foster home license. A copy of the licensing report, Act 116 of the Public Acts of 1973, as amended, and the licensing rules for foster homes are enclosed for your information.

If you do not agree with this decision, you may request a hearing by writing the Bureau of Administrative Hearings, 1000 Long Boulevard, Suite 14, P.O. Box 30041, Lansing, Michigan 48909, within thirty (30) days of your receipt of this letter. If you have any questions, please contact Family and Child Services of the Capitol Area, Inc.

Sincerely,

/s/ John T. Dempsey

JTD:DGF/kd

enclosures

cc: Harold S. Gazan, Director, Bureau of Regulatory Services

David G. Fitzgerald, Director, Division of Family Home Licensing
Marilyn Mikel, Consultant, Division of Family Home Licensing
Robert Bee, Director, Division of Child Welfare Licensing
Ken Phelps, Interim Director, Family & Child Services of the Capitol Area, Inc.
Barbara McLean, Licensing Worker, Family & Child Services of the Capitol Area, Inc.
Gerald Stevens, Attorney
Erika Weiss, Assistant Attorney General

September 14, 1979, from John T. Dempsey, Director of DSF, advising them that he concurred in the recommendation of the Family and Child Services of the Capitol Area, Inc. that the Sherrard license to operate a foster family home not be renewed. In his letter, he enclosed a copy of the licensing report, Act 116 of the Public Acts of 1973, and the licensing rules for foster homes and, in addition, advised the Sherrards of steps they could take to appeal the Department ruling.

On August 17, 1979, the Sherrards filed a petition in the Probate Court, Ingham County, Michigan, seeking a review and reversal of the decision to remove the children from the Sherrard home. Thereafter, the Sherrards moved to disqualify Judge Donald S. Owens, the Probate Judge, which motion was denied. On August 27, a hearing was held, although the Sherrards claim the Court refused to

hear them on the basis that as foster parents they had no standing. The Probate Court (under Order dated September 10, 1979) dissolved its earlier order wherein it had placed the care and custody of the two Smith girls with DSS. The effect of this order was to reinstate the Probate Court's full authority over Candace and Vernita Smith. In addition, the Probate Judge ordered (1) that two new caseworkers be assigned to the case to investigate "the minors' circumstances and make recommendations to the court as to their placement and (2) that the minors receive psychological evaluation." Thereafter, the matter was adjourned by the Judge "for review" to April 10, 1980. In addition, Judge Owens had refused to rule on the Sherrard's motion "until this court's authority to rule on them is clarified by the Federal District Court." In summary,

as of this date, the following facts appear uncontroverted:

(1) Candace and Vernita Smith are presently in a "neutral" foster home and no one claims that this home is not satisfactory or that the children are not receiving good care;

(2) The Sherrards have appealed the loss of their foster home license, which appeal (within the DSS) was to have been heard on October 29, 1978, but at the Sherrards' request, was adjourned to a later, unspecified date;

(3) The Probate Court has declined to hold a hearing on the Sherrard motion to review the removal decision apparently because of Judge Fox's temporary restraining order and "until the court's authority to rule on them is clarifed by the Federal District Court." However, Judge Owens ordered on October 25, 1979,

that "said matter be and is hereby set for review before the Hon. Donald S. Owens, Judge of Probate on April 10, 1980, 10:30 o'clock in the forenoon;

(4) The court appointed guardian ad litem, Timothy G. Holland, has consistently supported the decision of the DSS in removing the two Smith sisters from the Sherrard home.

II.

First of all, as of this date, it appears that plaintiffs have already pending in the Michigan Probate Court a hearing date on their petition to review the decision of the removal of the foster children from their home. Likewise, an administrative hearing within the DSS on the issue of the termination of their foster home license is also pending. Until these matters have been heard, decided and appealed, resort to this court appears premature. However, plaintiffs claim they already have been advised by the Judge of Probate that as foster parents they have no standing in his court to contest the removal decision and, further, the children in the meantime could be placed for adoption. In addition, because of a temporary restraining order issued last summer by Judge Fox, state officials are uncertain how and if they should proceed. Consequently, I am satisfied it will be in the best interest of all parties,

especially the two foster children, for this court to face up to the substantive issues raised by the parties in the pleadings, their briefs and at oral argument.

Plaintiffs claim a constitutional right to a hearing on the removal of the two Smith sisters from plaintiffs' foster home. Or, stated another way, they claim there exists in this case a "liberty interest" between themselves as foster parents and the foster children which the state may not impair without due process.

Before attempting to decide that question, it is important to make several general observations about this case. First of all, no two families are alike and to establish rules or guidelines applicable to all foster home situations would not only be unwise, but foolhardy. Likewise, of course, it is not always clear just what, in fact, does constitute a "family". The cases frequently emphasize the biological relationship and

yet it is common knowledge that attachments may be stronger and more meaningful in other types of relationships. Certainly another important factor in assessing adult/child relationships is the expectation of the parties at the time the relationship commences. As a part of this consideration would be the age and previous living experience of the particular child prior to entering into a foster home environment. In the present case, the two Smith girls had lived not only with their natural parents and their grandparents, but also another foster home prior to entering into the Sherrard foster home. This is not a situation where the foster children had been placed in foster care as infants. Nor is it a case where the foster children had never known their natural parents and had remained continually for several years in the care of the same foster parents. On May 15, 1978, when these sisters were placed in the Sherrard home, Candace was five and Vernita was

two. It is important to note that the placement of the children in the Sherrard foster home was by virtue of a written contract between the Sherrards and the placement agency. The contract provided that the placement agency would assume responsibility for determining "permanent plans for the child (children) and to work out plans with natural and adoptive parents." Also, at the time the children were placed in the foster home, the Sherrards were given, under Michigan law, only a provisional, six-month foster home license, which by its very name negates permanency. In addition, when the six-month "trial" period terminated, the agency expressed concerns about the family environment due to emotional problems of the young Sherrard boy, who also was living in the Sherrard home and, as a result, the provisional license was extended an additional six months rather than the customary granting of a permanent

two-year license. Added to this is the fact that the Sherrard boy, during the year in question, was a constant source of very serious problems to the Sherrards which not only required the need of outside professional counselling, but involved an unfortunate report made by a teacher at school involving alleged child abuse. All of the facts negate any reasonable expectation on the part of the Sherrards that they were acquiring or had in fact, acquired some constitutionally protected interest in having the Smith children remain in their home.

Although not clearly articulated either in the pleadings, affidavits or briefs, the plaintiffs appear to be arguing that during the year the Smith girls were in residence in their home, a mutual feeling of love and dependence developed to such an extent that plaintiffs are now entitled to the generally-acknowledged parental rights normally afforded to biological families.

This issue was squarely before the United States Supreme Court in Smith v. Organization of Foster Families, 431 U.S. 816, 97 S.Ct. 2094, 53 L.Ed.2d 14 (1977). The Supreme Court discussed at length foster family living arrangements, but then did not find it necessary to decide whether the "familial right to privacy" which is protected by the Fourteenth Amendment extends to foster parents. The case arose out of New York. The court reviewed in detail the procedures required under New York law before a foster child could be removed from its foster parents and concluded that the procedures were, in fact, adequate to protect whatever liberty interests the foster parents might have.

Subsequently, the Fifth Circuit was faced with the same issue in Drummond v. Fulton County Department of Family & Children's Services, et al., 547 F.2d 835 (5th Cir. 1977). Drummond involved a biracial

placement. The child was only one month of age when placed in the Drummond home. Evidence existed that strong emotional ties developed between the foster parents and the child. Further, the child was in the Drummond home in excess of two years prior to being placed in another foster home. The appellate panel which originally heard the case concluded that foster parents do, in fact, have a valuable liberty right which cannot be deprived them by the state without a due process hearing. The full court, however, on rehearing en banc 563 F.2d 1200 concluded that under the circumstances of that particular case "there is not such constitutionally protected interest". The court pointed out that, under Georgia law, which created the foster relationship in the first place, there was no basis whatsoever for a justifiable expectation that the relationship would be anything but temporary. The court then pointed out, at page 1207:

"True liberty rights do not flow from state laws, which can be repealed by action of the legislature. Unlike property rights they have a more stable source in our notions of intrinsic human rights. The very fact that the relationship before us is a creature of state law, as well as the fact that it has never been recognized as equivalent to either the natural family or the adoptive family by any court, demonstrates that it is not a protected liberty interest, but an interest limited by the very laws which create it. See Bishop v. Wood, 426 U.S. 341, 96 S.Ct. 2074, 48 L.Ed.2d 684 (1976)."

See also Kyees v. County Department of Public Welfare of Tippecanoe County, 600 F.2d 693 (1979). In that case, the defendant agency placed a small infant with Charles and Pauline Kyees, duly licensed foster parents in Indiana. Again, the child was

less than one year old and was with the Kyees family for a period in excess of two years. It is also clear from the record that the Kyees developed a strong emotional attachment to the child and began to express an interest in adopting him. However, Mr. Kyees was 66 and his wife 50, which was one of the principal reasons that the agency opposed the adoption. After the child was removed from their home, the foster parents brought suit alleging deprivation of constitutional rights in the removal of the child from their home. The court reviewed both Smith and Drummond in some detail and, like Drummond, concluded that "the question left open by the Supreme Court in Smith should be decided adversely to the existence of a liberty interest in a foster care arrangement of the nature and duration considered here." The court stated that critical to the Kyees claim of due process was whether or not the Kyees along with their

foster child had achieved the status of a "family". In ruling that no "family" protected rights had accrued, the court concluded, under Indiana law that "in this case the likelihood or virtual certainty of eventual termination of the foster relationship is made clear in state statutes and in the contracts executed by the foster parents." The court also concluded that because of the contractual arrangement, the foster parents at all times had reason to believe the adoption agency reserved the right to terminate the relationship.

III.

From all the evidence in the present case, I find that the Sherrards had no reasonable expectation of continued licensing as a foster home or that a liberty right had developed or accrued during the year in question which would be protected from state intervention by the Due Process Clause of the

Fourteenth Amendment. The only foster home license the Sherrards ever received from the state was a "provisional" license. The licensing statute defines a provisional license as "a license issued to child care organization which is temporarily unable to conform to all of the rules promulgated under the authority of this act." M.C.L.A. § 722.111(g). The statute provides that a provisional license shall expire six months from the date of issuance and may be issued not more than four times. M.C.L.A. § 722.117. Further, the statute provides "the issuance of a provisional license shall be contingent upon submission to the department of an acceptable plan to overcome the deficiency present in the child care organization within the time limitations of the provisional licensing period." M.C.L.A. § 722.117. To date, no plans for overcoming the deficiency with respect to mental health problems in the Sherrard home has been advanced by the

Sherrards. The Sherrards knew the children could not remain with them in the absence of a valid state foster home license. The problems in the family which made the license provisional in the first place continued unabated throughout the entire year. In addition as already pointed out (1) the children were not infants; (2) they knew other "parents" then [sic] the Sherrads; [sic] (3) they were with the Sherrards only one year; (4) the contract with the placement agency by its very terms places the responsibility of "permanent" plans for the Smith daughters upon the adoption agency, not the Sherrards; (5) the Sherrards were advised of the agencies' concern about the mental stability of the Sherrard boy and what effect his condition might have upon the two foster girls. Consequently, any expectation of "family" continuity or permanency based upon the provisional foster family license held by the Sherrards was totally

unreasonable and cannot support a claim of denial of due process when the license was revoked and the children removed from the home.

And, finally, even assuming a constitutionally protected interest in the Sherrards, I am satisfied that the Michigan procedures for revoking a foster home license are constitutionally adequate and meet the criteria set forth in Smith, supra. As previously pointed out, Michigan laws apply to foster home licensing rather than foster home removal. However, the result is the same. An adverse ruling to foster parents under either theory brings about a removal of the child from the home. Consequently, the rights of the foster parents are adequately protected whether the claim against them has to do with removal of the children or whether the claim is made that the license should either be revoked or not renewed. DSS is the licensing authority and responsible for

the development of rules for the care and protection of children in organizations covered by the Michigan statute. M.C.L.A. § 722.112. Independent agencies like FCS make recommendations to DSS. Provisional licenses, such as the one plaintiffs had, may be granted when the foster parents are in temporary noncompliance with agency rules, but such a license expires six months after issuance (M.C.L.A. § 722.117).

MCLA § 722.121[6] provides that DSS may revoke, refuse to renew, or modify a provisional license when the licensee is in violation. The DSS must notify the licensee in

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6. "722.121 * * * (2) * * * A license shall not be revoked, a renewal thereof shall not be refused, an application for a license shall not be denied, or a regular license shall not be modified to a provisional status unless the licensee, or applicant is given notice in writing of the grounds of the proposed revocation, denial, modification, or refusal. If revocation, denial, modification, or

refusal is appealed with 30 days of receipt of the notice by writing addressed to the director of the department, the director or his designated representative shall conduct a hearing at which the licensee, or applicant may present testimony and confront witnesses. Notice of the hearing shall be given to the licensee, or applicant by a personal service or delivery to the proper address by certified mail not less than 2 weeks before the date of the hearing. The decision of the director shall be made not more than 10 days following the hearing, and forwarded to the protesting party by certified mail not more than 10 days thereafter. If the proposed revocation, denial, modification, or refusal is not protested, the license may thereupon be revoked or the application therefor or the renewal thereof refused."

"722.122 Judicial review. Sec. 12. A person aggrieved by the decision of the director following the hearing under section 11 of this act may, within 30 days after receipt of the decision, take appeal to the circuit court of the county in which the person resides by filing with the clerk of the court an affidavit setting forth the substance of the

proceedings before the department and the errors of law upon which the person relies, and serving the director of the department with a copy of the affidavit. The circuit court shall thereupon have jurisdiction to hear and determine the questions of law involved in the appeal. If the department prevails, the circuit court shall affirm the decision of the department; if the licensee, or applicant prevails, the circuit court shall set aside the revocation, or order the issuance or renewal of the license as the case may be."

writing. This notice advises the licensee that if he objects, he may appeal to the department within 30 days. If appealed, the department must conduct a hearing. The licensee may present witnesses in evidence. The department must render a decision within ten days after the hearing. M.C.L.A. § 722.122 provides the licensee may appeal the decision to the state circuit court within 30 days. The court has authority to set aside the revocation, or order the issuance or renewal of the license, as the case may be.

The defendants in this case have substantially complied with these provisions. The Sherrards were granted a provisional license and told that they were in non-compliance. That license carried an expiration date of May 15, 1979. Although the exact form of the notice to the Sherrards that the license would not be renewed is not clear from the evidence, there can be little doubt

that the Sherrards had actual notice that the department did not plan to renew the foster home license. Also, as previously pointed out, Mr. Dempsey sent the Sherrards a letter (after removal of the children and after a hearing) informing them of the DSS decision not to renew their license. He stated the department's reasons and informed them of their right to appeal.

As a practical matter in the facts of this case it makes little difference that Michigan laws apply to licensing rather than to removal since the two foster girls were removed from the foster home on the day the Sherrards' license expired. What New York law provides that Michigan laws do not is notice and a hearing before removal. Michigan law provides notice before a change in the license. The fact that the children were physically removed before an administrative hearing was held is immaterial to the rights of the Sherrards. What is important is the

statutory right of the foster parents to a hearing, to have their lawyer present, to present evidence and to appeal an adverse decision to the state circuit court. The children remained at all times in the county and had there been a reversal of the decision to revoke the license, the children were physically available for return to the Sherrards' home.

As the Drummond court stated, Smith, supra, does not mandate the New York model as constitutionally necessary in every case. Not even in the New York system is removal stayed pending appeal to the department's decision unless the child has been with the foster parents 18 months or more.

It is the opinion and holding of this court that Michigan laws are constitutionally adequate to protect the interests of these foster parents, even assuming they have a constitutionally protected "liberty interest".

Defendants' motion to dismiss treated by

this court as one for summary judgment pursuant to Fed.R.Civ.P. 12(b) and 56 is granted. The plaintiffs have failed to state a claim upon which relief can be granted. Likewise, this court's Restraining Order of August 23, 1979, as amended November 1, 1979, is dissolved.

SO ORDERED.

No. 80-1998

Office-Supreme Court, U.S.
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ALEXANDER L. STEVAS,
CLERK

IN THE SUPREME COURT OF THE UNITED STATES

April Term, 1981

WAYNE SHERRARD and
JANET SHERRARD, his wife,
Petitioners,

-v-

DONALD S. OWENS, Judge of Probate Court,
Ingham County, Lansing, Michigan,
MICHIGAN DEPARTMENT OF SOCIAL SERVICES,
FAMILY AND CHILD SERVICES
OF THE CAPITOL AREA, INC.,
LUCILLE BARBER, Individually and as Employee,
Acting Director and Board Member of Family and
Child Services of the Capitol Area, Inc.,
MARY ELLEN HEATER, Individually and as
Employee of Family and Child Services of the
Capitol Area, Inc.,
BARBARA McLEAN, Individually and as
Employee of Family and Child Services of the
Capitol Area, Inc.,
TIMOTHY G. HOLLAND, Attorney at Law, Individually and
as guardian for Candace and Vernita Smith, Minors,
Jointly and Severally,
Respondents.

RESPONSE TO A PETITION FOR A WRIT OF CERTIORARI TO THE U.S. SUPREME COURT

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COUNTER-STATEMENT OF QUESTION PRESENTED

Whether certiorari should be granted to Petitioners where the rulings against them in the lower courts with regard to their alleged "liberty interest" have been entirely consistent with prior case law, where the lower courts have properly found the Petitioners received all procedural due process to which they were constitutionally entitled, and where Petitioners' reasons for review rely in part on an issue not raised, argued, or decided below.

COUNTER-STATEMENT OF THE CASE

Respondent, Family and Child Services of the Capitol Area, Inc., is a private, non-profit entity which endeavors to find foster home and adoptive placements for children who, for one reason or another, have no active parents. Respondents, Lucille Barber, Mary Ellen Heater, and Barbara McLean, were all employees of Family and Child Services for at least part of the time period apparently subscribed in the Petitioners' original complaint filed in the United States District Court for the Western District of Michigan on or about August 16, 1979.

Family and Child Services of the Capitol Area, Inc. is licensed by Respondent, Michigan Department of Social Services, pursuant to state statute, to provide foster care services for children who are wards of the State. Pursuant to this statutory delegation, the State of Michigan, through the offices of the Probate Court of Ingham County, placed Candace and Vernita Smith in the care of Family and Child Services of the Capitol Area, Inc. The purpose of such placement was for Family and Child Services of the Capitol Area, Inc. to locate appropriate foster family care for the foster children while resolution of their permanent legal status vis-a-vis their natural parents was resolved in the courts.

The Smith girls initially lived as foster children with their grandparents. Later, because of familial tension, the girls were removed to an independent foster home. Still later, on or about May 15, 1978, Family and Child Services of the Capitol Area, Inc. engaged the services of Wayne and Janet Sherrard to take custody of Candace and Vernita Smith as temporary foster parents.

Prior to such placement, on or about April 11, 1978, the Sherrards signed an agreement with Family and Child Services setting forth the context of their services as temporary foster parents (see Supplement to Appendix, page 30).

Pursuant to an Order of Respondent Donald S. Owen, Judge of the Ingham County Probate Court, the children were removed from the Sherrards' home on May 14, 1979, and relocated to another foster family home.

No decision as to the custodial rights of the natural parents was made by the courts in the State of Michigan until June 12, 1979.

On or about August 16, 1979, Petitioners filed a complaint in the U.S. Federal Court for the Western District of Michigan against, among others, Respondents, Family and Child Services of the Capitol Area, Inc., Lucille Barber, Mary Ellen Heater, and Barbara McLean. The complaint apparently alleged that as a result of various acts, said Respondents had denied the Petitioners their constitutional rights in removing Candace and Vernita Smith from their foster home.

On November 9, 1979, a hearing was held before District Court Judge Douglas Hillman with regard to motions to dismiss filed by various defendants in the original action.

On January 14, 1980, Judge Hillman issued his Opinion and Order with regard to Co-Respondents' Motions to Dismiss. The trial court treated the motions as ones for summary judgment, pursuant to Federal Rules of Civil Procedure 12(b)(6) and 56, granted said motions, and indicated Petitioners had failed to state a claim upon which relief could be granted.

Thereafter, on January 17, 1980, a Judgment was entered in the above entitled matter dismissing this matter without prejudice as to all defendants/respondents in accordance with the Opinion and Order of the Court dated January 14, 1980.

During the summer of 1979, Petitioners also pursued the various remedies available to them under state law by invoking the Michigan Administrative Procedures Act. In particular, the Petitioners appealed the Michigan Department of Social Services' decision to deny them renewal of their temporary foster home license.

A decision from the administrative agency with regard to such appeal was issued on or about March 26, 1980, even

though no full hearing was ever held before the administrative agency with regard to the licensing issue (Appendix p. A-6).

In the meantime, Petitioners had taken an appeal to the United States Court of Appeals for the Sixth Circuit. Oral argument before that court occurred on February 9, 1981, and the Court of Appeals' opinion was issued on or about March 18, 1981. The March 26, 1980, opinion of the administrative law judge as to the failure of State Department of Social Services to properly follow its own licensing provisions was thus in existence prior to the perfection of the Petitioners' appeal to the Court of Appeals, and prior to the oral argument in the Court of Appeals.

Despite this fact, Petitioners never raised the issue of the administrative agency's ruling until the filing of the Petition for Writ of Certiorari.

The District Court ruled, in essence (Supplement to Appendix, page 1, et seq), that the Petitioners, given the circumstances of their relationship with the Michigan Department of Social Services and/or Family and Child Services of the Capitol Area, Inc., had no reasonable expectation of continued custody of the Smith children which rose to the level of a constitutionally protected liberty interest. The District Court further held that, even if such liberty interest did exist, any right of procedural due process was, in fact, satisfied by the various opportunities given to Petitioners to present their objections to said removal to appropriate state agencies.

Judges Weick, Lively, and Engle of the United States Court of Appeals of the Sixth Circuit, similarly found that, given the circumstances of this case, there was no constitutionally protected liberty interest present. The Sixth Circuit further found that there was an adequate due process procedure with regard to the revocation of foster home care licenses in the State of Michigan.

Petitioners are now before this Court alleging that the lower courts improperly interpreted prior case law with regard to their alleged liberty interest in continued custody of the foster children. Petitioners further contend, for the first time, that the decision by the state administrative law judge, without full hearing, is binding on the federal courts in resolving the issue of whether Petitioners were afforded that procedural due process to which they were allegedly entitled.

REASONS FOR DENYING THE WRIT

There are three reasons why the writ should not be granted.

First, the decisions of the District Court and Court of Appeals are entirely consistent with prior case law. As a result, there is no "conflict" arising to the level of "special and important reason" to grant the writ within the meaning of the United States Supreme Court Rule 17.

Petitioners contend that the lower courts' decisions are in conflict with *Smith* v *Organization of Foster Families*, 431 US 816, 53 L Ed 2d 14, 97 S Ct 94 (1977). In particular, Petitioners allege that the Court of Appeals erred when it held Petitioners did not have a constitutionally protected liberty interest in continued custody over the foster children here involved.

In *Smith, supra*, this Court stated as follows with regard to the manner in which lower courts should review the issue of the alleged liberty interest of foster parents:

> . . . Here, however, whatever emotional ties may develop between foster parent and foster child have their origins in an arrangement in which the state has been a partner from the outset. While the Court has recognized that liberty interest may in some cases arise from positive law sources [citation omitted], in such a case, and particularly where, as here, the claimed interest derives from a knowingly assumed

> contractual relation with the State, it is appropriate to ascertain from state law the expectations and entitlements of the parties. In this case, the limited recognition accorded to the foster family by the New York statutes and the contracts executed by the foster parents argue against any but the most limited consitituional "liberty" in the foster family." (431 US 816, 845-846; 53 L Ed 2d 14, 36).

This court in *Smith* consequently set forth the form of analysis that a lower court should make in a case involving an alleged liberty interest on the part of foster parents.

Prior to *Smith, supra*, the supreme court never even implied that a foster parent, unrelated biologically to the foster child, had any constitutionally protected "liberty" interest in a continued relationship with the child. *Smith, supra* did not resolve that issue, as it reached no specific conclusion as to whether a foster parent has a liberty interest in a continued custodial relationship with a foster child.

The lower courts in the instant case dealt with this issue according to the direction given to them by the *Smith* decision. As is evident from the decision of District Court Judge Hillman and the decision of the Court of Appeals, the lower courts quite properly examined the specific circumstances surrounding the foster parent relationship in the instant case before deciding the issue.

Such was completely in accord with the *Smith, supra* directive. As the Court of Appeals indicated in its decision:

> . . . In this case, the plaintiffs had only a six month temporary license to conduct a foster family home at the time the two foster children were placed with them. Furthermore, the contract between the state agency and the plaintiffs placing the two children with the plaintiffs provided specifically that the state agency retained responsibility for permanent placement of the foster children. Under these cir-

> cumstances, the court concludes that at most the plaintiffs had an expectation of continuing as foster parents of the two children in question and that this did not rise to the level of a constitutionally protected liberty interest. (Court of Appeals Decision Appendix page A3-A4).

The decisions of the District Court and Court of Appeals in the instant case were also entirely consistent with decisions of other Courts of Appeal on the same issue.

In *Drummond* v *Fulton County Department of Family and Children's Services, et al*, 563 F2d 1200, (CA-5, 1977) cert denied, 437 US 910, 57 L Ed 2d 1141, 98 S Ct 3103 (1978) the Fifth Circuit ruled that there was no reasonable expectation, under Georgia law which created the foster family relationship, that such relationship would be anything but temporary:

> True liberty rights do not flow from state laws, which can be repealed by action of the legislature. Unlike property rights, they have a more stable source in our notions of interpreting human rights. The very fact that the relationship before us is a creature of state law, as well as the fact that it has never been recognized as equivalent to either the natural family or the adopted family by any court, demonstrates that it is not a protected liberty interest, but an interest limited by the very law which created it [citation omitted], 563 F2d 1200, 1207.

Although there was a trial-type hearing in *Drummond, supra*, the Court's resolution of the "liberty" question was not based on the evidence produced at the hearing, but rather on a reading of the Georgia foster care statutes in the context of other legal decisions concerned with the definition of the "liberty" interest:

> The argument that foster parents possess such a protected interest was placed squarely before, and discussed by, the Supreme Court in its recent deci-

> sion in *Smith* v *Organization of Foster Families* [citation omitted]. Although the Supreme Court did not find it necessary to resolve whether such an interest exists, Justice Brennan's discussion of the claim is helpful to our analysis. He first considered the elements which have traditionally been thought to define the concept of "family." Of course, the Court recognized that "the importance of the familial relationship, to the individuals involved and to the society, stems from the emotional attachments that derive from the intimacy of daily association." Nonetheless, the Court then noted several differences between foster and natural families, particularly the fact that the foster parent relationship has its genesis in state law, unlike the biological relationship, and that with foster parents there is often a natural parent seeking to assert a competing liberty interest.
>
> We conclude that there is no such constitutionally protected interest in the context of this case. An understanding of the role of the foster parent in a child placement helps make this conslusion plain . . . in the eyes of the state, which creates the foster relationship, the relationship is considered temporary at the outset and gives rise to no state created rights in the foster parents," 563 F2d 1200 1206, 1207.

A similar situation was presented in the case of *Kyees* v *County Department of Public Welfare*, 600 F2d 693, (CA-7, 1979). In *Kyees*, the Court granted Defendant's motion for summary judgment on the basis that there was no liberty interest on the part of the foster parents which rose to the level of constitutional due process guarantees:

> We have no difficulty in narrowing the case to the question of whether the relationship between plaintiffs and John Joe created a liberty interest which the state could not impair without due process. We see no property interest involved, and no fundamental rights wholly beyond the power of the state . . .

> In *Drummond* as well as here, there were facts indicating the development of strong emotional ties between the foster parents and the foster child. In both situations, the foster care relationship continued for approximately two years before termination by the state agency. In each case it could clearly be said that the foster parents at least had reason to believe that the state agency reserved the right to terminate the relationship." 600 F2d 693, 697, 698-699.

Given such facts, the *Kyees* court had even more reason to find a liberty interest than did the trial court and Court of Appeals herein. Despite that fact, *Kyees* held against the existence of such a liberty interest.

The second reason why the writ should not be granted is because Petitioners' only remaining argument is based on an issue not raised, argued, or decided below.

The Petitioners apparently now argue that the existence of a State of Michigan administrative decision reinstating the Petitioners' temporary foster care license is dispositive of the question of procedural due process. What Petitioners fail to note is that they never raised the issue of the agency decision below, nor did they ever argue that said decision should be dispositive of the constitutional due process issue.

As indicated in the Counter-Statement of the Case, the administrative law judge's decision was dated March 26, 1980. The argument before the Sixth Circuit Court of Appeals was February 9, 1981. Despite this almost one year delay between the decision referred to by the Petitioners and their argument before the Sixth Circuit, Petitioners never made any attempt to raise the administrative law decision as relevant to their appeal to the Sixth Circuit, nor did they argue that said decision was relevant in their oral argument before the Court.

Further, the administrative law decision is not part of the substantive record in this matter. The only way it has found its way into the Court file is as an attachment to a Motion for Advancement of the Court of Appeals hearing filed by Petitioners on or about August 28, 1980. Even that particular motion makes no specific mention of the administrative law judge's decision being relevant or raising any new issues with regard to the alleged issue of procedural due process.

As a result, numerous cases indicate that the court should not consider such issue:

> The government also contends that even if Almeida-Sanchez applies to checkpoint searches, the Court of Appeals erred in voiding the search because it occurred after the date of decision of Almeida-Sanchez but before the Court of Appeals stated in *United States* v *Bowen, supra*, that it would require probable cause for checkpoint searches. Examination of the government's brief in the Ninth Circuit indicates that it did not raise this question below. On the contrary, it represented to the Court that the decision in *Bowen* would be "determinative of the issues in this case." We therefore decline to consider this issue, which was raised for the first time in the petition for certiorari. *United States* v *Ortiz*, 422 US 891, 45 L Ed 2d 623, 629-630, 95 S Ct 2585 (1975); See also *Adickes* v *Kress & Co*, 398 US 144, 26 L Ed 2d 142, 90 S Ct 1598 (1970); *Lawn* v *United States*, 355 US 339, 2 L Ed 321, 78 S Ct 311 (1958); *Husty* v *United States*, 282 US 694; 75 L Ed 629, 51 S Ct 240 (1939); *Duignan* v *United States*, 274 US 195; 71 L Ed 996; 47 S Ct 566 (1927).

Inasmuch as Petitioners neither raised said issue before the Court of Appeals, nor was the issue considered by the Court of Appeals, this Court should not grant the writ.

The third reason why the writ should not be granted is that, even assuming the administrative law judge's decision

raises a question with regard to procedural due process, it is obvious from examination of the facts in this matter that the District Court and Court of Appeals properly decided that Petitioners received sufficient due process.

This Court has consistently held that the right to due process may require different procedures in different situations:

> Once it is determined that due process applies, the question remains what process if due." *Morrissey* v *Brewer*, 408 US at 481, 33 L Ed 2d 484. We turn to that question, fully realizing as our cases regularly do that the interpretation and application of the Due Process Clause are intensely practical matters and that "[t]he very nature of due process negates any concept of inflexible procedures universally applicable to every imaginable situation." [citations omitted] *Goss* v *Lopez*, 419 US 565, 42 L Ed 2d 725, 737, 94 S Ct 729 (1975) (emphasis added).

Given this need for flexibility, the Court has often stated that the due process clause requires certain minimum procedures:

> "The fundamental requisite of due process of law is the opportunity to be heard." *Grannis* v *Ordean*, 234 US 385, 394, 58 L Ed 1363, 34 S Ct 779 (1914), a right that "has" little reality or worth unless one is informed that the matter is pending and can choose for himself whether to . . . contest." *Mullane* v *Central Hanover Trust Company*, *supra*, 314, 94 L Ed 865, (citations omitted).
>
> At the very minimum, therefore, students facing suspension and the consequent interference with a protected property interest must be given some kind of notice and afforded some kind of hearing. *Goss*, *supra*, 42 L Ed 2d 725, 737; see also, *Roth*, *supra*, (emphasis added).

The administrative law judge's decision cited by Petitioners is, in and of itself, evidence that Petitioners did receive substantial due process. The invoked Michigan statutory procedures with regard to challenging the Michigan Department of Social Services' decision to remove their temporary license. In the end, the administrative law judge decided that the State had not totally complied with such procedures. The State, therefore, reinstated the temporary license.

Totally apart from the substantial procedures provided by the state licensing statutes, the Petitioners availed themselves of additional procedures by which they received notice and a hearing with regard to the removal of the children. As paragraph 19 of their Complaint admits, they were informed of the reasons for the removal of the foster children. The Court of Appeals Appendix, pages 290-291, 49-51, and the fourth paragraph of page 286, confirm that the Petitioners contested the removal procedures and had a "hearing" with these Respondents and Michigan Department of Social Services representatives shortly after the removal of the children. At that time, Petitioners presented their arguments against removal and were told the various reasons why department and agency representatives felt that removal was necessary.

When the procedures required in *Goss, supra*, are compared to the procedures available to, and utilized by Petitioners in the instant matter, there can be no question but that Petitioners received more than those minimum due process procedures necessary under the Constitution. Taking into consideration the guidelines set forth in a variety of this Court's decisions, including *Arnnett* v *Kennedy*, 416 US 134, 40 L Ed 2d 15, 94 S Ct 1633 (1974), *Withrow* v *Larkin*, 421 US 35, 45 L Ed 2d 714, 95 S Ct 1456 (1975) and *Cafeteria Workers* v *McElroy*, 376 US 896, 6 L Ed 2d 1230, 81 S Ct 1743 (1961), the Petitioners in the instant case had numerous opportunities to receive notice of the reasons for removal and to present their arguments against such removal.

CONCLUSION

Examination of the record and decisions below indicates that the decisions of the District Court and Court of Appeals are entirely consistent with prior case law in regard to the alleged "liberty" interest of foster parents in continued custody of foster children. The record further reveals that Petitioners received all procedural due process to which they were constitutionally entitled. The Petitioners having raised no special and important reasons for the granting of the writ, the writ should therefore be denied.

Respectfully submitted,

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80-1998

No.

IN THE SUPREME COURT OF THE UNITED STATES

APRIL TERM 1981

WAYNE SHERRARD AND JANET SHERRARD, his wife,
Petitioners,

-VS-

DONALD S. OWENS, Judge of Probate, Ingham County Probate Court, et al.,
Defendants.

DEFENDANT DONALD S. OWENS' BRIEF IN OPPOSITION TO PETITIONERS' PETITION FOR WRIT OF CERTIORARI

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ISSUES

I. Is the Court of Appeals' decision in conflict with this Court's decision in *Smith* v *Organization of Foster Families*, 431 US 816 (1977), or other Federal Court of Appeals' decisions on the same issue?

II. Did the Court of Appeals rely solely upon the District Court finding that Petitioners were afforded an adequate due process procedure in Michigan as the sole basis for affirming the District Court decision, and did the State Administrative Law Judge find the Petitioners were not accorded due process?

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ISSUE I

IS THE COURT OF APPEALS' DECISION IN CONFLICT WITH THIS COURT'S DECISION IN *SMITH* v *ORGANIZATION OF FOSTER FAMILIES*, 431 US 816 (1977), OR OTHER FEDERAL COURT OF APPEALS' DECISIONS ON THE SAME ISSUE?

Petitioner answers "Yes."

Respondent answers "No."

In *Smith* v *Organization of Foster Families*, 431 US 816 (1977), this Honorable Court found:

> Where, as here, the claimed interest derives from a knowingly assumed contractual relation with the State, it is appropriate to ascertain from state law the expectations and entitlements of the parties. In this case, the limited recognition accorded to the foster family by New York statutes and the contracts executed by the foster parents argue against any but the most limited constitutional 'liberty' in the foster family.

District Court Judge, the Hon. Douglas W. Hillman, specifically made reference to the contractual arrangement between the Sherrards and the placement agency, Child Services of Michigan, Ingham County Branch:

> Among other provisions of this agreement, the Child and Family Services of Michigan agreed to resume the responsibility 'to determine permanent plans for the child and to work out plans with natural and adoptive parents.' Page 29, Hillman Opinion

Thus, in the instant case, as in the *Smith, supra.*, there was a contractual agreement entered into by the foster parents by which the placement agency retained control over the children, and, of course, whereby the foster parents were paid for keeping the children in their home, all of which argues against any but the most limited constitutional "liberty" in the foster family.

In *Smith, supra.*, the court, after discussing the issue of liberty interest, decided the case on other grounds. Even assuming that there is a protected liberty interest, the Court found that the pre-removal procedures employed by the State of New York were constitutionally sufficient.

Although the *Smith, supra.*, court elected to decide that case on another issue, it did give some guidance to subsequent Court of Appeals cases. In *Drummond* v *Fulton County Department of Family and Child Services*, 563 F2d 1200 (5th Cir 1977), *cert denied*, 437 US 910 (1978), the State had designated some foster parents for a mixed race child for over two years. The child was approximately one month old at the time he was placed with the foster parents. The *Drummond, supra.*, court held:

> During this process in Georgia, children are placed in foster homes as an alternative to institutional care for what is clearly designated as a transitional phase in the child's life. Ga. Code Ann. §24A-1403 (1976) Foster parents are thus considered only on the basis of the quality of temporary care they can be expected to provide. Therefore, in the eyes of the state, which creates the the foster relationship, the relationship is considered temporary at the outset and gives rise to no state created rights in the foster parents. (P 207)

The Court went on to hold:

> There is no basis in the Georgia law, which creates the foster relationship, for a justifiable expectation that the relationship will be left undisturbed. cf. *Perry* v *Sindermann*, 408 US 593, 92 S Ct 2694, 33 L Ed 2nd 570 (1972). True liberty rights do not flow from state laws, which can be repealed by acts of the legislature. Unlike property rights they have a more stable source in our motions of intrinsic human rights. The very fact that the relationship before us is a creature of state law, as well as the fact that it has never been recognized as equivalent to either the natural family or the adoptive family by any court,

> demonstrates that it is not a protected liberty interest, but an interest limited by the very laws which create it. See *Bishop* v *Wood*, 426 US 341, 96 S Ct 2074, 48 L Ed 2nd 684 (1976).

This Supreme Court denied a petition for Writ of Certiorari in the *Drummond, supra.*, case.

Plaintiff in his brief cites considerable language from the dissent in the *Drummond, supra.* case. However, it should be remembered that it is just that—the dissent.

Another Court of Appeals court has considered this question. In *Kyees* v *County Department of Public Welfare*, 600 F2d 693 (7th Cir 1979), the court was faced with the situation where a nine-month old child was placed with foster parents and remained with these foster parents for approximately two years. The *Kyees, supra.*, court found:

> . . . In this case, as in *Smith*, the likelihood of vitural certainty of eventual termination of the foster relationship is made clear in state statutes and in the contracts executed by the foster parents. Because they can be extended by the state, foster families must, then, be seen as enjoying considerably more limited 'liberty' than natural families or those related by adoption. (P 698)

The Court went on to state:

> In *Drummond* as well as here, there were facts indicating the development of strong emotional ties between the foster parents and foster child. In both situations the foster care relationship continued for approximately two years before termination by the state agency. In each case, it could fairly be said that the foster parents at least had reason to believe that the state agency reserved the right to terminate the relationship.
>
> The majority of this panel, Judges Pell and Foreman, are persuaded by the reasoning of *Drummond* as

> ultimately decided, and conclude that the question left open by the Supreme Court in *Smith* should be decided aversely to the existence of a liberty interest in a foster care arrangement of the nature and duration considered here. (P 698-699)

In the case presently before this Court, the argument of the foster parents is even less compelling than that contained in either *Drummond* or *Kyees, supra.*, in that these foster parents only had the children for one year, rather than two years, and these children had, in fact, lived with their natural parents, their grandmothers and another foster family before arriving at the Sherrards for placement, at the ages of five and two.

This Defendant submits that the District Court opinion of the Hon. Douglas W. Hillman, affirmed by the 6th Circuit Court of Appeals, is in accordance with the decisions of *Smith, Kyees,* and *Drummond, supra.*, all of which have ruled adversely as to existence of a liberty interest in a foster care arrangement.

ISSUE II

DID THE COURT OF APPEALS RELY SOLELY UPON THE DISTRICT COURT FINDING THAT PETITIONERS WERE AFFORDED AN ADEQUATE DUE PROCESS PROCEDURE IN MICHIGAN AS THE SOLE BASIS FOR AFFIRMING THE DISTRICT COURT DECISION, AND DID THE STATE ADMINSTRATIVE LAW JUDGE FIND THE PETITIONERS WERE NOT ACCORDED DUE PROCESS?

Petitioner answers "Yes."

Respondent answers "No."

Plaintiff attempts to assert that the Administrative Law Judge found that Petitioners were not accorded due process. First of all, even had the Administrative Law Judge made such a finding, it is not binding upon the District

Court, the Court of Appeals or the Supreme Court. However, the Administrative Law Judge simply did not make such a ruling. The Administrative Law Judge did recommend a finding that Section 92 of the Michigan Administrative Procedures Act was not complied with, but said decision made no finding whatsoever that due process had been violated. (Appendix A-22)

In any event, the Hon. Douglas W. Hillman, affirmed by the United States Court of Appeals, Sixth Circuit, did not rest the decision solely upon the sufficiency of Michigan Administrative Procedures in disposing of Plaintiffs' action by summary judgment, but rather spent a lengthy amount of time discussing the absences of a "liberty" interest of these Plaintiffs, and this Defendant argues that it is on this basis that Petitioners' Petition for Writ of Certiorari should be denied.

CONCLUSION

Based upon the foregoing, the Respondent Donald S. Owens prays that Plaintiffs Petition for Writ of Certiorari be denied.

Respectfully submitted,
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